THE

LAW REPORTS.

Indian Appeals:

BEING

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

REPORTED BY HERBERT COWELL, ESQ.,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

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1878.

LIST

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HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL,

ESTABLISHED BY THE 3RD & 4TH WILL. IV., C. 41,

FOR HEARING AND REPORTING ON APPEALS TO HER MAJESTY IN COUNCIL.

1878.

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MAHARAJAH PERTAB NARAIN SINGH . APPELLANT; J. C.*

AND 1878

MAHARANEE SUBHAO KOER AND OTHERS RESPONDENTS. *May* 18, 31.

Ex parte TRILOKINATH.

ON APPEAL FROM THE COURT OF THE COMMISSIONER OF FYZABAD, OUDH.

Practice—Petition—Appeal heard ex parte—Re-hearing.

A Respondent, who has been properly made a party to a suit in the Courts below and bound by the proceedings therein, but who has not entered an appearance as Respondent to the appeal, or ordered any person to do so for him (the Appellant having failed to take the usual steps either to compel his appearance or to have the appeal regularly heard *ex parte* against him) is not entitled to have a re-hearing of the appeal, unless by some accident, without any default on his part, the appeal has been inadvertently disposed of, as if he had been heard.

Rajundernarain Rae v. *Bijai Govind Singh* (1), and *Ex parte Kistonauth Roy* (2), approved.

Where it appeared that a Respondent had full knowledge of the pendency of the appeal, and had furnished the funds for defending it in the name of another Respondent thereto, a re-hearing was refused.

An issue whether or not such Respondent had been properly made a party to the suit in the Courts below, and whether or not the proceedings in *India*, so far as he was concerned, were *coram non judice*, can only be tried in a new suit in the Courts below; and *quære*, whether in such suit he would be barred by an Order in Council, if made on appeal from a decree by which he was not bound.

THIS was a petition by the above-named *Trilokinath* praying that the above-named appeal might be re-heard in such manner and upon such terms as to Her Majesty might seem fit and the justice of the case require; and also that, with a view to such re-hearing, the suit in which the appeal arose might be remanded to

Present:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH and SIR ROBERT P. COLLIER.

(1) 1 Moore's P. C. Cases, 117; S. C. 2 Moore's Ind. Ap. Ca. 214.
(2) Law Rep. 2 P. C. 274.

J. C.
1878
MAHARAJAH PERTAB NARAIN SINGH v. MAHARANEE SUBHAO KOER. *Ex parte* TRILOKINATH.

India for evidence to be taken in the Petitioner's presence as a party to the suit, and that the Petitioner might have leave to adduce therein such evidence as he might be advised, or that the order already made by Her Majesty in Council in the above-mentioned appeal might be amended by reserving a right to the Petitioner of coming in and contesting the same within a time to be limited for that purpose, and that in the meantime such order should in no way prejudice or affect the Petitioner's interest in the subject-matter of the suit; and that he might be declared to be in no way barred thereby from asserting his rights to the property of the deceased Maharajah Sir *Man Singh*, or that such further or other order might be made as the circumstances of the case might require and to Her Majesty in Council might seem proper.

The facts of the case sufficiently appear in the judgment of their Lordships.

Sir *James Stephen*, Q.C., *Doyne*, and *Ross*, for the Petitioner *Trilokinath*.

Leith, Q.C., and *Graham*, for the Appellant.

1878
May 31.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

This application seems to involve two distinct questions:—

1st. Whether the Petitioner, if assumed to have been properly made a party to the suit in the Courts below, and bound by the proceedings therein, is entitled to have a re-hearing of the appeal by reason of his not having entered an appearance as Respondent to the appeal, or authorized any person to do so for him; and of the Appellant having failed to take the usual steps against him in order either to compel his appearance, or to have the appeal regularly heard *ex parte* against him.

2ndly. Whether, under the circumstances stated in the petition, he ought not to be treated as a person not properly represented in the suit in the Courts below, and therefore not bound by the proceedings therein; and if so, whether he is entitled to have the order of Her Majesty in Council varied so as to prevent its being

used against him as a bar to any proceedings which he might otherwise be entitled to take in the Courts of *India*.

The first question must, their Lordships think, be answered in the negative. The jealousy with which this tribunal regards any attempt to question the finality of one of its judgments, particularly after its confirmation by an Order in Council; the very rare instances in which such an order has been allowed to be reopened or varied; and the peculiar grounds upon which, if at all, this can be permitted, are elaborately considered in Lord *Brougham's* judgment in the case of *Rajundernarain Rae* v. *Bijai Govind Singh* (1); and in the more recent case of *Ex parte Kistonauth Roy* (2). It results from these authorities that the thing cannot be done unless by some accident, without any blame, and without any default on the part of the party himself, he has not been heard, and an order has been inadvertently made as if he had been heard.

Now, what are the facts in this case as regards the proceedings on the appeal here. The Appellant, who has been successful here, brought his suit in the proper Court of *Oudh* for a declaration of his title as the successor of taluqdari estates of the late Maharajah *Man Singh* (not praying for a decree of possession) against the Maharanee and widow of *Man Singh*, the Petitioner, then an infant, as represented by *Luchmi Nath*, his brother and guardian, and two other parties (one being *Luchmi Nath* in his own right), who, for the present purpose, may be left out of consideration. The Court of first instance dismissed the Plaintiff's claim, and that decree was affirmed by the Appellate Court, with only a variation as to the costs of the suit, which the Appellate Court directed to be paid to all parties out of the estate, instead of leaving each party to bear his own costs. In the hearing of both decrees the Petitioner is named as one of the Defendants; in the lower Court as an infant, appearing by his guardian *Luchmi Nath*; in the Appellate Court as an ordinary Defendant.

The crucial question in the cause was, whether an instrument in the nature of a will executed by the late Maharajah on the 22nd of April, 1862, and under which his widow had executed an

(1) 1 Moore's P. C. Cases, 117; S. C. 2 Moore's Ind. Ap. Ca. 214.

(2) Law Rep. 2 P. C. 274; S. C. 5 Moore's P. C. (N.S.) 360.

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appointment in favour of the Petitioner, had been revoked by the Maharajah in his lifetime.

This tribunal decided (1) this question in favour of the Plaintiff (Appellant), reversing the decrees of both the Courts below, and substituting a declaration of the title of the Appellant as heir to the Maharajah under clause 4 of sect. 22 of Act I. of 1869. The report to Her Majesty was made after a full hearing, on the assumption that the Petitioner, as well as the Maharanee, was represented by the counsel who appeared as for the Respondents on the appeal; and the Order in Council made in pursuance of it is, on the face of it, a final adjudication against both in favour of the Appellant's title.

It is now said, however, that the Petitioner never appeared to, and was not represented on, this appeal; and that the proper steps to have it heard against him *ex parte* were not taken. This case is supported by the affidavit of Mr. *Wilson*, the solicitor, who ostensibly conducted the appeal for the Respondents, who swears that he was retained only for the Maharanee; that he entered an appearance for her alone; that he had no instructions to appear for the Petitioner, and never entered an appearance on his behalf; and that, although the case filed by him was intituled in the same manner as the Appellant's petition of appeal, and was headed, "Case of the above Respondents," this was by a clerical error, which was not discovered by him until it was *recently* (that is presumably after the hearing of the appeal) brought to his notice.

On the other hand, it seems to their Lordships to be established by the affidavits of Mr. *Lattey* and of his clerk, Mr. *Hewett*, by the record itself, and by the bill of costs hereafter mentioned, all taken together, that although Mr. *Wilson* sent to Messrs. *Watkins & Lattey*, the solicitors for the Appellant, a note to this effect, "*Maharajah Pertab Narain Singh* v. *Maharanee Subhao Koer*—I have this day entered appearance for the Respondent in the above appeal," Messrs. *Watkins & Lattey*, on the 26th of May following, when they sent the manuscript record to Mr. *Wilson* in the usual

(1) See *Maharajah Pertab Narain Singh* v. *Maharanee Subhao Koer*, Law Rep. 4 Ind. Ap. 228.

course of business, distinctly asked him by letter whether he appeared for all the Respondents, and received no answer to that inquiry; that afterwards, and in the month of November, 1876, when a clerk of Mr. *Wilson's* and Mr. *Hewitt*, on behalf of Messrs. *Watkins & Lattey*, met at the Council Office for the examination of the printed record, the former indorsed his own, and allowed the Appellant's proof of the record to be indorsed, "*T. L. Wilson*, for the Respondents;" that the record as finally printed bears that indorsement; that Mr. *Wilson*, in May and June, 1877, was served with orders calling upon him to bring in the printed cases of all the Respondents; that he made no objection to the form of such orders, but ultimately brought in the printed case, headed as the case of "the above-named Respondents;" that he thus induced his opponents and this Committee, on the hearing of the appeal, to believe that he was acting for all the Respondents; and that after their Lordships had pronounced their decision, which, amongst other things, directed the costs of all parties to the appeal to be taxed, with a view to the payment of them out of the estate, he brought in before the registrar a bill of costs, which was not only headed as the bill of costs of all the Respondents, but contained items of charge relating to the correspondence between himself and the Petitioner in *India* with reference to the appeal.

Their Lordships must remark that if the case stood here, they would, upon these facts, have serious ground of complaint against Mr. *Wilson*, whose conduct of the case of his admitted client, if he really had no authority to represent the Petitioner, was such as to mislead not only his opponents, but their Lordships. They cannot admit his explanation that the heading of the case was a mere clerical error, and that in fact he was acting, and purporting to act, for the Maharanee alone. Whatever may have been his personal knowledge of these proceedings, he must be held to be responsible for the acts of his clerks, and cannot be acquitted of, to say the least, gross carelessness in allowing the appeal to be conducted as he says it was.

The case, however, does not rest on Mr. *Wilson's* conduct of the appeal. The Petitioner has himself filed an affidavit, from which

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it appears that in May, 1875, after the decree of the Appellate Court in *India*, but whilst the appeal to Her Majesty was pending, the Maharanee executed a further appointment in his favour, by which she relinquished the life interest which she had reserved by the former instrument; that he, being then of full age, though a minor when the suit was commenced, was put into possession of the property; and in 1877 corresponded directly with Mr. *Wilson* touching the appeal, in which, in fact, he had become the sole person interested, and furnished the funds for defending it, at all events in the name of the Maharanee. He had, therefore, full knowledge of the pendency of the appeal; and unless he was content, as he might well be, since their title was almost identical, to defend it in the name of the Maharanee, he might have taken, and ought to have taken, the necessary steps to appear by separate counsel in order to defend his interests. It seems, then, to their Lordships, that this is not a case in which, according to the principles laid down in the cases above referred to, the order of Her Majesty can be re-opened or varied, on the mere ground that he was not properly represented upon the appeal, or cited to appear to it. It cannot be said that there has been no default on the part of the Petitioner.

He asserts, however, that he was never properly made a party to the suit in the Courts below, and that the proceedings in *India*, so far as he is concerned, were *coram non judice*. He alleges that his brother *Luchmi Nath* was not his guardian; that the objection was taken in an early stage of the suit; that *Luchmi Nath* was then dismissed from the suit, not only as a Defendant in his own capacity, but also as the supposed guardian of his infant brother; that no guardian *ad litem* was ever appointed in his place; that whatever part *Luchmi Nath* afterwards took in the management of the suit, he took as agent on behalf of the Maharanee alone; that he, the Petitioner, was never properly represented in the suit, was never duly served with process therein, and that if his name was retained in the title of the cause, it was so retained irregularly and improperly. If these facts can be established, it may be that the final decree in the suit, *i.e.*, the declaration of the Plaintiff's title, considered independently of the Order in Council, and merely

as a decree of the Indian Courts, would not be *res judicata* against the Petitioner. But it is clear that that issue can only be properly tried in a new suit in *India*. And there is the more reason for trying the question in *India*, since what the Petitioner desires is not a mere re-hearing of the cause on the evidence as it stands, which would probably be of little advantage to him, but a re-trial of it on fresh evidence.

It is, however, said, that in such a suit in *India* the Order in Council might be opposed to him as a fatal bar. It would, however, be open to the Petitioner to contend that it was not such a bar, if he should succeed in shewing that he was not bound by the decree against which the appeal was preferred. Their Lordships do not wish to prejudge that question, as they would prejudge it if upon this application they were to recommend Her Majesty to vary the Order in Council. Should a new suit ever be brought, the determination of the Indian Courts upon that, as upon any other question raised in such suit, will be subject to appeal. Their Lordships, therefore, will humbly recommend Her Majesty to dismiss this petition with costs.

Solicitor for Petitioner: *F. Barrow.*

Solicitors for Appellant: *Watkins & Lattey.*

J. C.* 1878 May 15; June 5.

HER MAJESTY THE QUEEN . . . . APPELLANT;

AND

BURAH . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Powers of Legislature—Indian Councils' Act, 1861, s. 22—*Indian High Courts Act*, 1861—*Conditional Legislation—Act XXII. of* 1869.

Act No. XXII. of 1869 of the Indian Legislature, which excludes the jurisdiction of the High Court within certain specified districts, is not inconsistent with the *Indian High Courts Act* (24 & 25 Vict. c. 104), or with the charter of the High Court, and is in its general scope within the legislative power of the Governor-General in Council.

The 9th section of that Act, which confers upon the Lieutenant-Governor of *Bengal* the power to determine whether the Act, or any part of it, shall be applied in a certain district, is conditional legislation, and not a delegation of legislative power.

Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a provincial legislature, they may be well exercised, either absolutely or conditionally; in the latter case leaving to the discretion of some external authority the time and manner of carrying its legislation into effect, as also the area over which it is to extend.

APPEAL from a judgment of a full bench of the High Court (March 26, 1877).

The Respondent *Burah* and one *Book Singh*, since deceased, were tried by the Deputy-Commissioner of the *Khasi* and *Jaintia Hills*, in the *East Indies*, on a charge of murder of one *Kana Lalung*, committed near *Yeothymmai*, in the territory known and defined as the *Jaintia* and *Khasi Hills*, and sentenced to the punishment of death, but the sentence was afterwards, on the 23rd of April, 1876, commuted by the Chief Commissioner of *Assam* to transportation for life.

On the 9th of July, 1876, the officer in charge of the *Kamroop Jail*, where the said *Burah* and *Book Singh* were in confinement as prisoners under the said last-mentioned sentence, forwarded to

* *Present*:—LORD SELBORNE, SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

the High Court at *Calcutta* petitions of appeal from them, dated the 9th of July, 1876, against the sentence.

The High Court having doubts whether they had jurisdiction over the prisoners referred the question of their power to entertain the petitions to a Full Bench of the said Court.

The question was argued before a Full Bench on two occasions, and the majority of the High Court, on the 26th of March, 1877, decided that the said Court had such jurisdiction, and that the record of the case ought to be sent for in order to the admission of the appeal, and the said Court passed judgment and ordered the same accordingly.

By Act XXII. of 1869 of the Council of the Governor-General of *India* in Council for making laws and regulations, which is entitled "An Act to remove the *Garo Hills* from the jurisdiction of the tribunals established under the General Regulations and Acts, and for other purposes," it is, among other things, provided as follows:—

Sect. 2. "This Act shall come into operation on such day as the Lieutenant-Governor of *Bengal* shall by notification in the *Calcutta Gazette* direct.

Sect. 3. "On and after such day, Act No. VI. of 1835 (so far as it relates to the *Khasi Hills*, therein termed '*Cossyah*' *Hills*), and the *Bengal* Regulation X. of 1822, shall be repealed: Provided that such repeal shall not affect any settlement of land revenue or other matters made under the latter enactment with zemindars or other persons in any place to which this Act applies.

Sect. 4. "Save as hereinafter provided, the territory known as the *Garo Hills*, bounded on the north and west by the district of *Gawalpara*, on the south by the district of *Mymensingh*, as defined by the Revenue Survey, and on the east by the *Khasi Hills*, is hereby removed from the jurisdiction of the Courts of Civil and Criminal Judicature, and from the control of the offices of revenue constituted by the Regulations of the *Bengal* Code and the Acts passed by any Legislature now or heretofore established in *British India*, as well as from the law prescribed for the said Courts and offices by the Regulations and Acts aforesaid. And no Act hereafter passed by the Council of the Governor-General for making laws

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and regulations shall be deemed to extend to any part of the said territory, unless the same be specially named therein.

Sect. 5. "The administration of civil and criminal justice, and the superintendence of the settlement and realization of the public revenue, and of all matters relating to rent, within the said territory, are hereby vested in such officers as the said Lieutenant-Governor may, for the purpose of tribunals of first instance or of reference and appeal, from time to time appoint. The officers so appointed shall, in the matter of the administration and superintendence aforesaid, be subject to the direction and control of the said Lieutenant-Governor, and be guided by such instructions as he may from time to time issue.

Sect. 8. "The said Lieutenant-Governor may from time to time, by notification in the *Calcutta Gazette*, extend to the said territory any law, or any portion of any law, now in force in the other territories subject to his Government, or which may hereafter be enacted by the Council of the Governor-General, or of the said Lieutenant-Governor, for making laws and regulations, and may on making such extension direct by whom any powers or duties incident to the provisions so extended shall be exercised or performed, and make any order which he shall deem requisite for carrying such provisions into operation.

Sect. 9. "The said Lieutenant-Governor may from time to time, by notification in the *Calcutta Gazette*, extend *mutatis mutandis* all or any of the provisions contained in the other sections of this Act to the *Jaintia Hills*, the *Naga Hills*, and to such portion of the *Khasi Hills* as for the time being forms part of *British India*.

"Every such notification shall specify the boundaries of the territories to which it applies."

Under the provisions of the said Act, No. XXII. of 1869, the Lieutenant-Governor of *Bengal*, on the 14th of October, 1871, issued a notification, which was published in the *Calcutta Gazette*, and thereby in exercise of the powers conferred upon him by sect. 9, he extended the provisions of the said Act to the territory known as the *Khasi* and *Jaintia Hills*, and excluded therefrom the jurisdiction of the Courts of Civil and Criminal Judicature, and specified in the notification the bounda-

ries of the said territory. The following is a copy of the notification:—

Notification.

"The 14th of October, 1871, under sect. 9 of Act XXII. of 1869, the Lieutenant-Governor is pleased to extend all the provisions of that Act to the district of the *Khasi* and *Jaintia Hills*, bounded as follows:—

"By the districts of *Kamroop* and *Nowgong* on the north.

"The districts of *Naga Hills* and *Cachar* on the east.

"The *Gáro Hills* on the west.

"The districts of *Sylhet* and *Cachar* on the south.

"The chief political and revenue control of the aforesaid district, and the administration of civil and criminal justice, are vested in the Commissioner of *Assam*, subject to the general direction and control of the Lieutenant-Governor.

"The Commissioner will exercise the powers of the High Court in the civil and criminal cases triable in the Courts of the said district, provided that no sentence of death shall be carried out without the sanction of the Lieutenant-Governor, and that it shall be competent to the Lieutenant-Governor to call for the record of any criminal or civil case, and to pass thereon such orders as to him may seem fit.

"The Deputy Commissioner of the district, and his assistants the native chiefs and officers, and the subordinate officers of Government, will exercise the same powers as they have hitherto exercised, until otherwise directed. No case not now triable in the ordinary British Courts shall by this notification be made triable therein. In respect of cases hitherto triable in those Courts, the officers shall be guided by the spirit of the laws prevailing in *British India* and heretofore in force in the district.

"(Signed) *S. C. Bayley*,
"Officiating Secretary to
the Government of *Bengal*."

The said High Court, for reasons assigned in separate judgments of Mr. Justice *Markby* and three other Judges, forming the majority of the said Court (*Garth*, C.J., *Macpherson* and *Pontifex*, JJ., dissenting), decided (March 26, 1877) that the notification of the

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Lieutenant-Governor of *Bengal* had no legal force or effect in removing the said territory from the jurisdiction which the High Court had previously possessed over it, inasmuch as the Council of the Governor-General of *India* in Council for making laws and regulations had under its constitution, by the *Councils Act*, 1861, no power to delegate such authority to the Lieutenant-Governor as it had by the Act XXII. of 1869 in fact purported to delegate. Accordingly they decided that the High Court had jurisdiction to entertain the defence of the before-mentioned prisoners, notwithstanding the provisions of Act XXII. of 1869. Thereafter, on the 10th of October, 1877, the petitions of appeal came on for hearing before a Division Bench of the High Court, and on such hearing were dismissed.

The Government of *India*, on behalf of the Crown, being dissatisfied with the judgment and order of the Full Bench, dated March 26, 1877, a petition was presented to Her Majesty in Council by the officiating Advocate-General of *Bengal* praying for special leave to appeal therefrom to Her Majesty in Council; and on the 11th of July, 1877, such special leave was granted.

By the statute 24 & 25 Vict. c. 67 (the *Indian Councils Act*, 1861), the power given to the Governor-General in Council at meetings for the purpose of making laws and regulations is conferred by the 22nd section, which is as follows:—

Sect. 22. "The Governor-General in Council shall have power at meetings for the purpose of making laws and regulations as aforesaid, and subject to the provisions herein contained, to make laws and regulations for repealing, amending, or altering any laws or regulations whatever now in force or hereafter to be in force in the Indian territories now under the dominion of Her Majesty, and to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of Justice whatever, and for all places and things whatever within the said territories, and for all servants of the Government of *India* within the dominions of princes and states in alliance with Her Majesty; and the laws and regulations so to be made by the Governor-General in Council shall control and supersede any laws and regulations in any wise repugnant thereto which shall have been made prior thereto by the Governors of the Presidencies of *Fort St. George*

and *Bombay*, respectively, in Council, or the Governor or Lieutenant-Governor in Council of any presidency or other territory for which a council may be appointed, with power to make laws and regulations, under and by virtue of this Act: provided always, that the said Governor-General in Council shall not have the power of making any laws or regulations which shall repeal or in any way affect any of the provisions of this Act:

Or any of the provisions of the Acts of the 3rd and 4th years of King *William* the Fourth, chapter 85, and of the 16th and 17th years of Her Majesty, chapter 95, and of the 17th and 18th years of Her Majesty, chapter 77, which, after the passing of this Act, shall remain in force:

Or any provisions of the Act of the 21st and 22nd years of Her Majesty, chapter 106, entitled 'An Act for the better government of *India*,' or of the Act of the 22nd and 23rd years of Her Majesty, chapter 41, to amend the same:

Or of any Act enabling the Secretary of State in Council to raise money in the *United Kingdom* for the Government of *India*:

Or of the Acts for punishing mutiny and desertion in Her Majesty's Army, or in Her Majesty's Indian Forces respectively, but subject to the provisions contained in the Act of the 3rd and 4th years of King *William* the Fourth, chapter 85, section 73, respecting the Indian Articles of War:

Or any provisions of any Act passed in this present session of Parliament, or hereafter to be passed, in anywise affecting Her Majesty's Indian territories, or the inhabitants thereof:

Or which may affect the authority of Parliament or the constitution and rights of the *East India* Company, or any part of the unwritten laws or Constitution of the United Kingdom of *Great Britain* and *Ireland* whereon may depend in any degree the allegiance of any person to the Crown of the *United Kingdom*, or the sovereignty or dominion of the Crown over any part of the said territories."

Sir *James Stephen*, Q.C., and *Graham*, for the Appellant, said that the main question was whether sect. 9 of Act XXII. of 1869

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was within the legislative capacity of the Council; for, assuming the validity of that section, no objection had been raised to the notification. The three questions raised by the judgments of the Court below were, first, whether the Legislature had the power to remove the district in question from the jurisdiction of the High Court; second, whether it had the power to do so in the manner prescribed by Act XXII. of 1869, sect. 9; third, whether it is *ultrà vires* of the High Court to question the validity of an Indian Legislative Act.

As respects the first of these questions, it was pointed out that all the Judges were in favour of the existence of such legislative authority; and as regards the third question, they disclaimed that contention, and conceded that the High Court had such power.

With regard to the existence of such legislative authority, reference was made to 3 & 4 Will. 4, c. 85, s. 43; 24 & 25 Vict. c. 67, s. 22; 24 & 25 Vict. c. 104, ss. 9, 11, 13; and to *The Queen* v. *Meares* (1). By sects. 9, 11, and 13 of c. 104, it was intended to preserve to the Governor-General in Council certain legislative powers which otherwise, by reason of the provision in sect. 22 of c. 67, the Governor-General in Council would not have had. The matters covered by those sections are matters relating to the High Court in respect of which the Governor-General in Council was intended to have legislative powers. See, too, *The Queen* v. *Reay* (2). Act XXII. of 1870 gave validity retrospectively to all the provincial Acts which were open to the objections there taken. It asserts the power of the Governor-General in Council to interfere with the charters of the High Court. Reference was also made to 34 & 35 Vict. c. 35, s. 3, reciting Act XXII. of 1870 of the Governor-General's Council; *Feda Hossein's Petition* (3). See also *High Courts Act, i.e.* c. 104, s. 17, which prolongs the power of issuing letters patent for three years, and clause 44 of the Letters Patent of 1865.

The next question was whether the Legislature had power to affect the jurisdiction of the High Court by the mode provided in sect. 9 of Act XXII. of 1869. The powers of the Indian Legisla-

(1) 14 B. & B. 106. (2) 7 Bomb. H. C. R. Cr. Ca. 77.
(3) Ind. L. R. 1 Calc. 431.

ture are as great as those of the Canadian, and see 30 & 31 Vict. c. 3 (*Canada*), s. 91; which establishes the Parliament of *Canada*. Compare 3 & 4 Will. 4, c. 85, s. 45. [LORD SELBORNE:—Is it contended that the Legislature may not render its enactment dependent for its coming into operation on the act of the executive?] That is the main contention on the other side. The powers given to the Lieutenant-Governor are within the limits of the legislative authority to confer; see Act XXII. of 1869, sects. 5 and 8. For instances of conferred discretion, see Act XI. of 1857; Act XVI. of 1857; Act XXIII. of 1861, sect. 39; Act VIII. of 1859, sect. 385; Act XIV. of 1859, sect. 24. The Legislature frequently delegates authority to say when the Act is to come into force, within what limits it is to be applied, and to make rules and orders. For instances of delegation of authority by Parliament to the Governor-General, see 22 & 23 Vict. c. 27; 28 Vict. c. 15, sects 3 and 5; 28 Vict. c. 18; 33 Vict. c. 3; 24 & 25 Vict. c. 67, sects. 44, 46, and 47. It would be a serious thing to interfere with the exercise of such delegated authority as being *ultrà vires* the legislative authority to confer. It has been frequently exercised in the colonies as well as in *India*: see Act III. of 1865 (*Cape of Good Hope*), sect. 12.

J. B. Norton and *Raikes* (*Eardley Norton* with them), for the Respondent, said that the Judges of the High Court seemed to have been unanimously of opinion that the Indian Legislature could legally remove districts from the jurisdiction of the High Court, and also that it was open to the High Court to try the validity of a law made by the Indian Legislature. The real question upon which difference of opinion existed was whether the Indian Legislature, by the particular means it had adopted in this case, effectually and legally carried out the object it had in view. They contended that the jurisdiction of the High Court as established by Parliament, could not be wholly abolished by any authority in *India*. Reference was made to the *Indian Councils' Act*, 24 & 25 Vict. c. 67, sect. 22. It was never intended to grant such power as is now claimed. According to the true construction of the above section it is not granted, but it is by necessary implication excluded. Compare that

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section with 3 & 4 Will. 4, c. 85, s. 43. There is a significant and intentional omission in sect. 22, which in other respects is *totidem verbis*. Under sect. 43 of the former Act the Governor-General could legislate for all Courts whether by charter or otherwise, and for their jurisdiction. In 1861 the *High Courts Act*, 24 & 25 Vict. c. 104, and the *Councils' Act*, c. 67, were passed within six days of each other to carry out one and the same scheme. Jurisdiction was provided for under c. 104, and power to legislate in reference to the High Court was expressly reserved to Parliament by sects. 9, 11, and 13 of c. 104. No argument therefore can be drawn from c. 67, in favour of such legislative authority residing in the Indian Legislative Councils under that Act. Sect. 18 deals with territorial jurisdiction, and that is repealed by 28 & 29 Vict. c. 15, s. 2.

Next, assuming that the Indian Legislature has the power which is claimed for it, it has not adopted the proper method. If the jurisdiction of the High Court can be abolished by that Legislature, it must be by an Act passed by the Governor-General in Council, in conformity with the powers conferred on him in that respect by the Imperial Parliament. No such Act could delegate any legislative authority or power enabling the Lieutenant-Governor of *Bengal*, if he so pleased, to abolish the jurisdiction of the High Court. No such power of delegation was given, either expressly or by necessary implication, from the terms of the *Indian Councils' Act*. The notification of the 14th of October, 1871, was a nullity and of no legal effect. Reference was made to *Doyle* v. *Falconer* (1); and for American authorities to *Barto* v. *Himrod* (2); *Parker* v. *Commonwealth* (3); *Thorne* v. *Cramer* (4); *Bradley* v. *Baxter* (5). Parliament has constituted the legal machinery for making laws, nominating qualified persons, and regulating the method, time, and place by and in which Acts are to be passed, and has jealously guarded the degree in which any departure from their provisions may be effected, whenever such departure is permitted. Reference was made to 3 & 4 Will. 4, c. 85, s. 43, repealed by 24 & 25 Vict. c. 67, s. 40; Ibid. s. 70; 16 & 17 Vict.

(1) Law Rep. 1 P. C. 328.
(2) 4 Selden, N. York Rep. 483.
(3) 6 Barr. (Pennsylvania Rep.) 507.
(4) 15 Barb. (N. York Rep.) 112.
(5) 15 Barb. 122.

c. 95, s. 22; 17 & 18 Vict. c. 77, s. 3; 24 & 25 Vict. c. 67, ss. 10, 14, 21, 22, 23, 25; 33 Vict. c. 3.

Lastly, it was contended that the question of the legislative capacity of the Governor-General's Council to affect the jurisdiction of the High Court did not arise in this case, inasmuch as by the true construction of Act XXII. of 1869 the jurisdiction of that Court as to the *Garo Hills* was not excluded. The Council had not assumed to exercise the legislative authority contended for, and still less to delegate its exercise in reference to the *Khasi* and *Jaintia Hills*. The nature of this contention sufficiently appears in their Lordships' judgment.

Sir *James Stephen*, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD SELBORNE:—

This appeal has been brought under the following circumstances:—

In the year 1869 the Indian Legislature passed an Act (No. XXII. of 1869), purporting, first, to remove a district called the *Garo Hills* from the jurisdiction of the Courts of Civil and Criminal Judicature, and from the control of the offices of revenue, constituted by the regulations of the *Bengal* Code and the Acts passed by any Legislature then or theretofore established in *British India*, and from the law prescribed for such Courts and offices by such Regulations and Acts; and, secondly, to vest the administration of civil and criminal justice, within the same territory, in such officers as the Lieutenant-Governor of *Bengal* might, for the purpose of tribunals of first instance, or of reference and appeal, from time to time appoint. This Act was to come into operation on such day as the Lieutenant-Governor of *Bengal* should, by notification in the *Calcutta Gazette*, direct. By the 9th section the Lieutenant-Governor was empowered "from time to time, by notification in the *Calcutta Gazette*," to "extend, *mutatis mutandis*, all or any of the provisions contained in the other sections to the *Jaintia Hills*, the *Naga Hills*, and such portion of the *Khasi Hills* as might, for the time being, form part of *British India*," being,

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as their Lordships understand, a mountainous district, conterminous towards the east with the *Garo Hills*.

The Lieutenant-Governor of *Bengal*, by notification in the manner prescribed by this Act, fixed the time at which it should come into operation in the *Garo Hills;* and afterwards, by another notification published in the *Calcutta Gazette* on the 14th of October, 1871, he extended all its provisions to the district of the *Khasi* and *Jaintia Hills*, declaring the administration of civil and criminal justice within that district to be vested in the Commissioner of *Assam*, subject to the general direction and control of the Lieutenant-Governor; and adding, that the Commissioner should exercise the powers of the High Court in the civil and criminal cases triable in the Courts of the district; provided, that no sentence of death should be carried out without the sanction of the Lieutenant-Governor, and that it should be competent for the Lieutenant-Governor to call for the record of any criminal or civil case, and to pass thereon such orders as to him might seem fit; and that the Deputy Commissioner of the district, and his assistants, the native chiefs and officers, and the subordinate officers of Government, should exercise the same powers as they had hitherto exercised, until otherwise directed.

Under this Act, and these notifications, one *Burah* (the Respondent here) and another person, since deceased, were in the year 1876 tried by the Deputy Commissioner of the *Khasi* and *Jaintia Hills* upon a charge of murder committed within that hill territory. They were convicted and sentenced to death, but on the 23rd of April, 1876, the sentence was commuted by the Chief Commissioner of *Assam* to transportation for life. On the 9th of July, 1876, they presented a petition of appeal to the High Court at *Calcutta;* and a majority of the Judges of that Court (four against three) decided, after argument in Full Bench, that the case fell within their appellate jurisdiction; and they sent for the record of the proceedings with a view to an adjudication thereon. From that decision the present appeal has, by special leave, been brought.

The ground on which the majority of the High Court assumed jurisdiction was, that the 9th section of the Act of 1869, purporting to authorize the Lieutenant-Governor of *Bengal* to extend

the Act of 1869 to the *Khasi* and *Jaintia Hills*, was in excess of the legislative powers of the Governor-General in Council.

In the argument before their Lordships, the jurisdiction of the High Court was sought to be supported, not on that ground only, but on two others also, viz. (1), that the Act of 1869 did not, according to its true construction, exclude the jurisdiction of the High Court as to the *Garo Hills*, and, therefore, could not do so as to the *Khasi* and *Jaintia Hills*, assuming them to have been brought within its operation; and (2), that the whole Act of 1869 (at least so far as it might affect the jurisdiction of the High Court), and not sect. 9 only, was void, and *ultrà vires* of the Indian Legislature. The latter of these arguments had been urged unsuccessfully before the High Court at *Calcutta;* but the former was not presented to that Court, and was first suggested, at the hearing before their Lordships, by the junior counsel for the Respondent.

Their Lordships will first deal with that argument.

It was founded on the proposition, that the 4th section of Act XXII. of 1869 purports to remove the *Garo Hills*, not from the jurisdiction of the High Court, established by Her Majesty's letters patent under the authority of Imperial Statutes, but only from that of the local Courts, constituted by the regulations of the *Bengal* or by Acts of the Indian Legislature; and, therefore, that even if the jurisdiction of those local Courts was effectually taken away, and others (constituted by the appointment of the Lieutenant-Governor of *Bengal*) substituted for them, the appellate jurisdiction of the High Court remained.

Assuming (but not deciding) that "the Courts of Civil and Criminal Judicature," mentioned in the 4th section of the Act of 1869, were only the Courts of original jurisdiction established under the Indian Regulations and Acts, their Lordships think that the supposed consequence does not follow. It may be possible that under the terms of the 8th and 9th sections of the *High Courts Act* (24 & 25 Vict. c. 104), together with the 27th and 28th sections of the Royal Letters Patent (28th December, 1865), under which the *Calcutta* High Court is constituted, appeals might have gone to that Court from criminal tribunals of first instance, established by the Lieutenant-Governor of *Bengal* in the *Garo*, or

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the *Khasi* and *Jaintia Hills*, if Act XXII. of 1869 had made no other provision for such appeals. But the 5th section of that Act distinctly authorized the Lieutenant-Governor to appoint tribunals, not of first instance only, but also of "Reference and Appeal;" and, by the notification now in question, he has done so, giving the powers of the High Court to the Commissioner of *Assam*, with an ultimate controlling authority to himself. Unless, therefore, the whole Act of 1869, or the 9th section of that Act, was void, as being in excess of the legislative powers of the Governor-General in Council, the jurisdiction of the High Court has been excluded.

The next question is, whether the whole Act of 1869 is void? It is said to be so, because the jurisdiction of the High Court was established by the Act of the Imperial Parliament already referred to (24 & 25 Vict. c. 104), which passed in the same session with the *Indian Councils' Act*; and because, by sect. 22 of the *Indian Councils' Act* (24 & 25 Vict. c. 67), the power of the Governor-General in Council "to make laws and regulations for repealing, amending, or altering any laws or regulations whatever now in force, or hereafter to be in force, in the Indian territories now under the dominion of Her Majesty, and to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of Justice whatever, and for all places or things whatever within the said territories," is qualified by certain conditions; one of which is, "that the Governor-General shall not have the power of making any laws or regulations which shall repeal or in any way affect any of the provisions of any Act passed in this present session of Parliament, or hereafter to be passed, in anywise affecting Her Majesty's Indian territories, or the inhabitants thereof." None of the other conditions expressed in the Act apply to this case.

The question, therefore, is, whether an exercise of the legislative power of the Governor-General in Council, purporting to exclude the jurisdiction of the High Court within these particular districts, is inconsistent with any of the provisions of 24 & 25 Vict. c. 104?

Now, it appears to their Lordships, from the express terms of the Act 24 & 25 Vict. c. 104, that (unless there should be anything to the contrary in the letters patent under which the High Court is established) the exercise of jurisdiction in any part of

Her Majesty's Indian territories by the High Courts was meant to be subject to, and not to be exclusive of, the general legislative power of the Governor-General in Council, as to "all Courts of Justice whatever."

By the 1st section of that Act, Her Majesty was authorized, by letters patent, "to erect and establish a High Court of Judicature for the *Bengal* division of the Presidency of *Fort William*," and others at *Madras* and *Bombay*. The next six sections relate to the qualifications, tenure of office, and emoluments, &c., of the Judges of such Courts. The 8th section abolishes, from the date of their establishment, the previously existing Supreme and Sudder Courts in the several presidencies. The material provisions as to jurisdiction are contained in the 9th, 11th, and 12th sections. The 10th and 18th may be laid out of the case, because they were both repealed by a subsequent Act of 1865 (28 & 29 Vict. c. 15). But, as some argument was founded on the 18th, it may be fit here to observe, that, by that section, Her Majesty was empowered to make Orders in Council transferring any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts, "and generally to alter and determine the territorial limits of the said several Courts;" and that the same power was, in substance, conferred upon the Governor-General of *India* in Council (not in his legislative, but in his executive capacity) by the repealing Act of 1865.

The 9th section of 24 & 25 Vict. c. 104, expressly says, that each of the High Courts shall, within its own presidency, have such civil, criminal, and other jurisdiction "as Her Majesty may, by her letters patent, grant and direct;" and that, "save as by such letters patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of *India* in Council," the High Court in each presidency shall have all the jurisdiction of the former Supreme and Sudder Courts, abolished by sect. 8. The authority of the Indian Legislature over the jurisdiction of the High Courts (so far, at all events, as the exercise of that authority might be consistent with Her Majesty's letters patent) is here distinctly recognised.

The 11th section is similar in effect. It enacts that, after the

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establishment of the High Courts, every provision in any Act of Parliament, Order in Council, Charter, or Act of the Legislature of *India*, which had been applicable to the Supreme Courts of *Bengal*, *Madras*, and *Bombay*, shall be applicable to the High Courts, as far as may be consistent with that Act itself, and the letters patent to be issued under it, "and subject to the legislative powers, in relation to the matters aforesaid, of the Governor-General of *India* in Council." The 12th section contains nothing of importance to the present question.

The Act of 1865 (under which the *Calcutta* letters patent of the 28th of December, 1865, were actually issued) concludes with an express saving of "the power of the Governor-General in Council at meetings for the purpose of making laws and regulations."

Lastly, by the letters patent of the 28th of December, 1865 (clause 44), it is "ordained and declared that all the provisions of these our letters patent are subject to the legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making laws and regulations."

So far, therefore, from being in contravention of any of the provisions of the statute 24 & 25 Vict. c. 104, or of the letters patent issued under that statute (as altered by the Act of 1865), their Lordships find that such an exercise of legislative authority by the Governor-General in Council as might remove any place or territory from the jurisdiction of the High Court at *Calcutta* is expressly contemplated and authorized both by those statutes and by the letters patent themselves. Their Lordships, under these circumstances, agree with the High Court, that Act No. XXII. of 1869 was, in its general scope, within the legislative power of the Governor-General in Council: and they are therefore brought to the consideration of the more limited question, whether, consistently with that view, the 9th section of that Act ought nevertheless to be held void and of no effect.

The ground of the decision to that effect of the majority of the Judges of the High Court was, that the 9th section was not legislation, but was a delegation of legislative power. In the leading judgment of Mr. Justice *Markby*, the principles of the doctrine of agency are relied on; and the Indian Legislature seems to be

regarded as, in effect, an agent or delegate, acting under a mandate from the Imperial Parliament, which must in all cases be executed directly by itself.

Their Lordships cannot but observe that, if the principle thus suggested were correct, and justified the conclusion drawn from it, they would be unable to follow the distinction made by the majority of the Judges between the power conferred upon the Lieutenant-Governor of *Bengal* by the 2nd and that conferred on him by the 9th section. If, by the 9th section, it is left to the Lieutenant-Governor to determine whether the Act, or any part of it, shall be applied to a certain district, by the 2nd section it is also left to him to determine at what time that Act shall take effect as law anywhere. Legislation which does not directly fix the period for its own commencement, but leaves that to be done by an external authority, may with quite as much reason be called incomplete, as that which does not itself immediately determine the whole area to which it is to be applied, but leaves this to be done by the same external authority. If it is an act of legislation on the part of the external authority so trusted to enlarge the area within which a law actually in operation is to be applied, it would seem *à fortiori* to be an act of legislation to bring the law originally into operation by fixing the time for its commencement.

But their Lordships are of opinion that the doctrine of the majority of the Court is erroneous, and that it rests upon a mistaken view of the powers of the Indian Legislature, and indeed of the nature and principles of legislation. The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers

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were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.

Their Lordships agree that the Governor-General in Council could not, by any form of enactment, create in *India*, and arm with general legislative authority, a new legislative power, not created or authorized by the *Councils' Act*. Nothing of that kind has, in their Lordships' opinion, been done or attempted in the present case. What has been done is this. The Governor-General in Council has determined, in the due and ordinary course of legislation, to remove a particular district from the jurisdiction of the ordinary Courts and offices, and to place it under new Courts and offices, to be appointed by and responsible to the Lieutenant-Governor of *Bengal;* leaving it to the Lieutenant-Governor to say at what time that change shall take place; and also enabling him, not to make what laws he pleases for that or any other district, but to apply by public notification to that district any law, or part of a law, which either already was, or from time to time might be, in force, by proper legislative authority, "in the other territories subject to his government." The Legislature determined that, so far, a certain change should take place; but that it was expedient to leave the time, and the manner, of carrying it into effect to the discretion of the Lieutenant-Governor; and also, that the laws which were or might be in force in the other territories subject to the same Government were such as it might be fit and proper to apply to this district also; but that, as it was not certain that all those laws, and every part of them, could with equal convenience be so applied, it was expedient, on that point also, to entrust a discretion to the Lieutenant-Governor. This having been done as to the *Garo Hills*, what was done as to the *Khasi* and *Jaintia Hills?* The Legislature decided that it was fit and proper that the adjoining district of the *Khasi* and *Jaintia Hills* should also be removed from the jurisdiction of

the existing Courts, and brought under the same provisions with the *Garo Hills*, not necessarily and at all events, but if and when the Lieutenant-Governor should think it desirable to do so; and that it was also possible that it might be expedient that not all, but some only, of those provisions should be applied to that adjoining district. And accordingly the Legislature entrusted, for these purposes also, a discretionary power to the Lieutenant-Governor.

Their Lordships think that it is a fallacy to speak of the powers thus conferred upon the Lieutenant-Governor (large as they undoubtedly are) as if, when they were exercised, the efficacy of the acts done under them would be due to any other legislative authority than that of the Governor-General in Council. Their whole operation is, directly and immediately, under and by virtue of this Act (XXII. of 1869) itself. The proper Legislature has exercised its judgment as to place, person, laws, powers; and the result of that judgment has been to legislate conditionally as to all these things. The conditions having been fulfilled, the legislation is now absolute. Where plenary powers of legislation exist as to particular subjects, whether in an imperial or in a provincial Legislature, they may (in their Lordships' judgment) be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances, it may be highly convenient. The British Statute Book abounds with examples of it: and it cannot be supposed that the Imperial Parliament did not, when constituting the Indian Legislature, contemplate this kind of conditional legislation as within the scope of the legislative powers which it from time to time conferred. It certainly used no words to exclude it. Many important instances of such legislation in *India* are mentioned in the opinions of the Chief Justice of *Bengal*, and of the other two learned Judges who agreed with him in this case. Among them are the great Codes of Civil and of Criminal Procedure (Acts VIII. of 1859, XXIII. of 1861, and XXV. of 1861).

By section 385 of the Code of Civil Procedure, it is provided that "this Act shall not take effect in any part of the territories

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not subject to the general regulations of *Bengal*, *Madras*, and *Bombay*, until the same shall be extended thereto by the Governor-General in Council" (not in his legislative capacity), "or by the Local Government to which such territory is subordinate, and notified in the *Gazette*." Section 445 in the Code of Criminal Procedure is precisely similar. And by sect. 39 of Act XXIII. of 1861, when any such extension as that authorized by section 385 of the Act of 1859 is made, it may, with the previous sanction of the Governor-General in Council (not in his legislative capacity), be declared to be "subject to any restriction, limitation, or proviso which the Local Government may think proper." If their Lordships were to adopt the view of the majority of the High Court, they would (unless distinctions were made on grounds beyond the competency of the judicial office) be casting doubt upon the validity of a long course of legislation, appropriate, as far as they can judge, to the peculiar circumstances of *India*; great part of which belongs to the period antecedent to the year 1861, and must therefore (as Sir *Richard Garth* well observed) be presumed to have been known to, and in the view of, the Imperial Parliament, when the *Councils' Act* of that year was passed. For such doubt their Lordships are unable to discover any foundation, either in the affirmative or in the negative words of that Act.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal in the present case should be allowed, and the judgment of the High Court reversed.

Solicitor for Appellant and Respondent: *The Solicitor, India Office.*

RAMJISDAS AND IMTIAZ ALI . . . . APPELLANTS; J. C.*

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RAJAH BHAGWAN BAX AND ANOTHER . RESPONDENTS. *May* 22, 23; *June* 22.

ON APPEAL FROM THE COURT OF THE COMMISSIONER, LUCKNOW DIVISION, OUDH.

Oudh Talookdars Relief Act (XXIV. of 1870), *s.* 10—*Appeal allowed though presented after the prescribed Period.*

Case in which, having regard to exceptional circumstances and exceptional legislation, an appeal to the Commissioner of Division against a decision of a manager appointed under the *Oudh Talookdars Relief Act*, was *held* to have been rightly allowed, although preferred long after the period of six weeks prescribed by sect. 10. It appeared that the Appellant in the Court below was a minor, and incapable of exercising his right to appeal except through the manager, who himself made the order appealed from, and that the Respondents (present Appellants) had after the expiration of the said six weeks themselves prayed for a judicial determination of substantially the same questions as were raised by the present appeal.

APPEAL preferred from a decision (Feb. 1, 1875) of the Commissioner of the *Lucknow* Division of the province of *Oudh*, reversing the decisions of Mr. *Finn*, as manager of an incumbered estate (Nov. 3, 4, 25, 1872), passed under the provisions of the *Oudh Talookdars Relief Act* (XXIV. of 1870) in favour of the Appellants.

The questions raised by this appeal were, 1, as to the jurisdiction of the Commissioner under sect. 10 of the above Act to entertain the appeal after the lapse of so long a time and under the circumstances of the case; 2, supposing that jurisdiction to exist, whether upon the merits of the case and the law applicable to it the Appellants were not entitled to the larger rate of interest awarded by the manager.

The circumstances of the case and the course of the proceedings sufficiently appear in their Lordships' judgment.

The judgment appealed against was as follows:—

"The first order in this case was passed by Mr. *Glynn*, Deputy Commissioner, on the 4th of September, 1871. This left a sum of

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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Rs.3107. 8*a.* for further inquiry. The next order is dated the 10th of June, 1872, disallowing the claim to the sum of Rs.3107 8*a.*, and directing that after the 4th of September, 1871, interest should be paid at the rate of 6 per cent. per annum.

"The estate was subsequently brought under Act XXIV. of 1870, and the superintendent, Mr. *Finn*, admitted an application for review of the Deputy Commissioner's order, on the ground that the order was given before the estate was brought under the Act.

"The notification bringing the estate under the Act is dated the 30th of October, 1871, therefore the estate was under the Act when the Deputy Commissioner, by his order of the 10th of June, 1872, fixed the rate of interest at 6 per cent per annum, and Mr. *Finn* acted under a misapprehension.

"On the 4th of November, 1872, Mr. *Finn* passed an order directing that Rs.3913 should be added to the claim against Defendant, and interest should be allowed at 18 per cent. per annum to date, and at 6 per cent. per annum on the principal till satisfaction.

"On the 25th of November, 1872, Mr. *Finn* passed an order (based on a decision which was manifestly wrong of the Commissioners, *Lucknow*, in the case of *Mirza Agha Ali Khan* v. *Girdhari Sing*) to the effect that the rate of interest agreed upon should be allowed up to the date of decision, and thereafter 12 per cent. per annum on the amount covered by the bond, and on the remainder of the debt at 6 per cent. per annum.

"These proceedings came before the Chief Commissioner, who objected in his executive capacity to the award of 12 per cent. per annum interest as clearly illegal, the maximum rate allowable under Rule 8 of the rules framed in accordance with the Act, and which have the force of law, being 6 per cent.

"Under these circumstances the person really interested, *i.e.*, the proprietor of the estate, being a minor, I admitted this appeal for reasons recorded in my order of the 2nd of November last, though the term had long expired.

"Respondent objects that under Act XXIV. of 1870 an appeal cannot be admitted beyond six weeks, and the *General Limitation Act* does not apply. This Act was passed subsequently and does

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not apply, but under the former law Act VIII. of 1859, sect. 333, appeals were admissible beyond the term, when sufficient cause was shewn for delay, and in my opinion the circumstances of the case and the minority of the Appellant do afford sufficient cause.

"It is certainly most unusual to admit an appeal after two years, but the case is a very peculiar one, and as a matter of fact the decree appealed from is so manifestly illegal that it cannot be enforced. Rule 8, which has the force of law, prescribes 6 per cent. as the maximum rate of interest awardable, and an award of 12 per cent. is a decree incapable of execution.

"Act XXIV. of 1870 has undoubtedly hit capitalists very hard; still, where the provisions of the law are clear, we have no power to set them aside in their favour.

"Appellant objects to other matters besides the rate of interest, but I decline to go into them now.

"On the 10th of June, 1872, Mr. *Glynn*, Deputy Commissioner, had full power to fix the rate of interest, and he fixed it at 6 per cent.

"Mr. *Finn*, in November, 1872, reversed the Deputy Commissioner's order under a misapprehension, and after the usual term for admitting reviews had expired.

"Mr. *Finn's* order fixing the rate of interest being, as above shewn, clearly illegal, I set it aside and restore that of the Deputy Commissioner, under which Respondent will receive 6 per cent. per annum only.

"The parties will pay their own costs."

Doyne, for the Appellants.

Mayne, for the Respondent, the Superintendent of Incumbered Estates, *Lucknow* Circle.

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The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

This is an appeal from a judgment of the Commissioner of the *Lucknow* Division of the Province of *Oudh*, by which he varied an order made by the Superintendent of Incumbered Estates under the *Oudh Talookdars Relief Act* of 1870.

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To make the judgment and the grounds of appeal from it intelligible a short history of the case is necessary.

On the 3rd of June, 1870, Rajah *Omrao Sing*, talookdar of *Pakra Ausari*, executed a deed whereby he acknowledged that he had received Rs.60,000 from the Appellants, for which sum he pledged his estate to them. They were to hold the estate and receive the rents and profits of it for twelve years, after which time he was to be entitled to repay them the principal and interest at 12 per cent. per annum and to recover possession of the estate.

Soon after another advance of Rs.12,000 was made to the Rajah, and Rs.3000 were advanced to his brother for which he became security. Some other small sums were advanced to him at 18 per cent.

His estate was soon after taken possession of by the Court of Wards on a representation, which turned out to be unfounded, of his incapacity; subsequently on his application the provisions of the *Oudh Talookdars Relief Act* (XXIV. of 1870) were duly applied to the estate.

The order directing the application of the Act to the estate, and appointing a manager, was dated the 30th of October, 1871. Mr. *Glynn*, the Deputy Commissioner of the province, who had been the manager under the Court of Wards, was appointed manager under the Act. In November, 1872, he was succeeded by Mr. *Finn*.

The *Oudh Talookdars Relief Act* appears to have been enacted mainly in the interest of the talookdars, for the purpose of protecting them in some degree against the claims of money-lenders by which their estates were being consumed, and undoubtedly some of its provisions are somewhat stringent against creditors. With its policy, however, we have no concern. The Act, after restraining proceedings in execution against the talookdar and his estate,—invalidating all incumbrances created by him during the management, investing the manager with large powers for protecting and improving the property, and other purposes, and providing for the proof of debts, proceeds to enact as follows:—

"9. The manager shall in accordance with the rules to be made under this Act determine the amount of the debts and liabilities due to the several creditors of the talookdar, and persons holding

mortgages, charges or liens on the said property, or any part thereof.

"10. An appeal against any refusal, admission or determination under sects. 7, 8, or 9, shall lie, if preferred within six weeks from the date of such determination, to the Commissioner of Division to whom the manager is subordinate, and the decision of such Commissioner or of the manager if no such appeal has been so preferred, shall be final.

"11. When the total amount of such debts and liabilities has been finally determined, the manager shall prepare and submit to the Chief Commissioner a schedule of such debts and liabilities, and a scheme for the settlement thereof, and such scheme when approved by the Chief Commissioner shall be carried into effect. Until such approval is given, the Chief Commissioner may, as often as he thinks fit, send back such scheme to the manager for revision, and direct him to make such further inquiry as may be requisite for the proper preparation of the scheme."

Section 20 enables the Chief Commissioner to make rules consistent with the Act in all matters connected with its enforcement, and declares "that such rules when approved by the Governor-General of *India* in Council, and published in the local official *Gazette*, shall have the force of law."

Rules were duly made in pursuance of the Act, of which the 8th is in these terms:—

"When the amount of any debt, both principal and interest, has been determined, the manager may direct that interest, at a rate not exceeding 6 per cent. per annum, shall be paid on the aggregate sum declared to be due from the date of the decision till the date of payment."

The combined effect, therefore, of the Act and of the Rule made under it is that the manager is to determine the amount due for the principal and interest up to the date of his determination, calculating such interest according to the contract rate (if any), and may allow subsequent interest on the amount so determined, as upon a judgment debt, up to the time of payment, provided the rate of such subsequent interest does not exceed 6 per cent.

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Mr. *Glynn* on the 4th of September, 1871, while he was manager under the Court of Wards, made the following memorandum:—

"The claim (of Appellants) for Rs.60,000 + Rs.12,000 will now be registered. There were Rs.3000 let off, and I will not bring them in now against the Rajah after a compromise. About the remaining Rs.3107. 8*a.* inquiry will be made on copies of the claimants' books being received. The Rajah will be referred to also about this money and it will be admitted if no valid reason be shewn against my doing so by the Rajah."

After Mr. *Glynn* was appointed as manager under the Act, the following memoranda were made by him:

"Will not let off more than the Rs.3000. *Imtiaz Ali* will let off 10 per cent. for cash payment on interest.

"27th April, 1872."

"The interest on the Rs.72,000 will be according to the bond up to September, 1871, and after that at 6 per cent. per annum. The claim for Rs.3107 8*a.* in respect to Babu *Quidal Sing* is not admitted. The Babu has his own village, and the Babu should be proceeded against.

"10th June, 1872."

It has been contended on the part of the Respondent that this last memorandum was a "determination" by Mr. *Glynn*, under the 10th section of the Act, and that not having been appealed against within six weeks it became final. Their Lordships, however, do not regard it as such a determination. On the appointment of Mr. *Finn* as manager in November, 1872, the Appellants brought their claim before him, contending, and rightly as it appears to their Lordships, that there had been no final determination by his predecessor, whereupon Mr. *Finn* made an order, which he was induced to alter on review. His order on review, dated the 25th of November, 1872, increased the principal sum, and thus concluded:—

"Interest on the debt to date of decision will be calculated at the rate agreed upon. Future interest upon the sum covered by the bond at 1 per cent. (per mensem), and remainder of the debt at 6 per cent. per annum."

Soon after this order the Rajah died and was succeeded by his infant son, who is a Respondent together with the manager (or superintendent) of the incumbered estates.

After a good deal of delay this order was brought to the attention of the Chief Commissioner, who, acting probably under the powers conferred on him by the 11th section of the Act, appears to have disapproved of so much of it as directed future interest at 12 per cent. per annum, regarding this rate of interest as prohibited by the 8th rule, in which view their Lordships concur. Thereupon (and on the 8th of June, 1874), the following proceeding was recorded by Pundit *Kali Sahae,* described as Superintendent of Incumbered Estates, *Lucknow* Circle:

"A docket No. 1322, dated the 29th of April, 1874, has been received from the personal assistant to the Chief Commissioner under cover of the Commissioner's docket No. 1704, dated the 4th of May, 1874, directing that the superintendent was not authorized to award interest at a higher rate than 6 per cent. Wherefore a higher rate of interest than 6 per cent. will not be allowed.

"Ordered that a letter be addressed to the decree holders, communicating to them the above information. This proceeding will be filed with the record."

On this the Appellants became unable to avail themselves of Mr. *Finn's* order and a deadlock appears to have ensued. The next material proceeding was taken by the present Appellants, who appealed to the Commissioner of the *Lucknow* Division against the foregoing order of *Kali Sahae.* The Division Commissioner referred them to the Chief Commissioner, who declined to interfere in their behalf, whereupon they preferred another appeal to the Division Commissioner, dated the 10th of September, 1874, wherein they contended that Mr. *Finn's* order was right and that it was final. The petition concludes in these terms:

"Under these circumstances your Petitioner most respectfully re-submits his petition of appeal with inclosures, and prays that it may be formally admitted and judicially disposed of to enable any of the parties feeling aggrieved by the decision to prefer his appeal under section 4, Act VI. of 1874, to Her Majesty's Privy Council."

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The present Appellants therefore, in September, 1874, desired a judicial determination on substantially the same questions as are raised in the present appeal.

It does not appear what, if anything, was done upon the appeal of September, 1874, and it may be inferred that the proceedings dropped, or were superseded by those next to be mentioned.

On the 23rd of October, 1874, an appeal raising the same question in another form was presented by the present Respondents against the order of Mr. *Finn*, on the ground (among others) that it was illegal on the face of it in giving a rate of interest prohibited by law. On this appeal the Commissioner ordered that, Mr. *Finn's* calculation of principal being adopted, the interest should be calculated under the terms of the deed up to Mr. *Glynn's* order of the 10th of June, 1872, and thereafter at 6 per cent. per annum.

This is the judgment now appealed against, and the point mainly relied upon is, that the appeal being out of time, the Commissioner had no jurisdiction to entertain it. The Commissioner was aware of the difficulty in the way of his hearing the appeal raised by the limitation of appeals prescribed by the 10th section of the *Oudh Talookdars Relief Act*, and appeared to think that sect. 333 of Act VIII. of 1859 might apply to the case, in which view their Lordships cannot concur. He proceeded to dwell on the exceptional nature of the case, on the fact of the Respondent being a minor and incapable of exercising his right to appeal, except through the manager, who himself made the order, and could scarcely be expected to appeal against it—a state of things which the Act does not seem to contemplate—he referred to the action of the Chief Commissioner, who objected to the allowance of interest beyond the lawful rate, practically setting aside Mr. *Finn's* order, and he might have referred to the appeal of the now Appellants against the order of the 8th of June, 1874, whereby they desired an adjudication on practically the same question as that raised in the appeal before him, expressly with the object of getting rid of the deadlock occasioned by the conflicting decisions in *Oudh* by an appeal to Her Majesty in Council. He finally came to the conclusion that he had power to amend so much of the order as was manifestly at variance with the law. Their Lord-

ships, although the case is not free from difficulty, are not so clearly satisfied that under the exceptional legislation with which they have to deal, and the exceptional circumstances of this case, the Commissioner had not this power to deal with the order of his subordinate officer, as to feel themselves driven to a decision the effect of which would be to reverse an order which appears to them, except in one particular, just and proper, and to set up another which, if acted upon, would practically repeal the 8th rule made under the *Oudh Talookdars Relief Act*. The particular referred to is that the order directs the 6 per cent. interest to commence from the 10th of June, 1872, the date of Mr. *Glynn's* memorandum; whereas in their opinion that date should be the 25th of November following, when the gross amount then due for principal and interest was finally determined by Mr. *Finn*. They will therefore humbly advise Her Majesty that the order appealed against be varied so far as to direct that the amount determined by Mr. *Finn* on the 25th of November, 1872, to be due should be adopted, and that subsequent interest should be allowed thereon at the rate of 6 per cent. per annum. There will be no costs of this appeal.

Agent for the Appellants: *T. L. Wilson.*
Agent for the Respondent: *The Solicitor, India Office.*

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THE ZEMINDAR OF PITTAPURAM . . PLAINTIFF;

AND

THE PROPRIETORS OF THE MUTTA OF KOLANKA . . . . . } DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Res judicata—Act VIII. of 1859, *s.* 2—*Adverse Possession.*

In a suit to recover possession of certain houses and grounds appertaining thereto, it appeared that the property had formed the subject of another suit brought by the Plaintiff against his grandfather's widow and the Defendants' father and aunt in which the Plaintiff's claim to restrain the widow from acts of waste had been dismissed, no claim, however, to the property having then been made by the Plaintiff, nor any allegation made or evidence offered to connect the Defendants' father therewith:—

Held, that the decision in the former suit was not a decision in a suit between the same parties, or parties under whom they claim, establishing the right of the Defendants in the former suit to the property in question in the present suit, and that the cause of action in the present suit was not determined in the former suit.

A plea of limitation in the present suit cannot be sustained without evidence as to the title under which Defendants, or those under whom they claim, held the property in question; whether in their own right or as trespassers, or under an arrangement with the Plaintiff.

APPEAL from a decree of the High Court (July 14, 1876) confirming a decree of the District Court of *Godavery* (Oct. 2, 1875) whereby the Appellant's suit was dismissed. The decision in both Courts rested upon the ground that the suit was *res judicata*.

The suit was brought on the 16th of November, 1874. Its nature and the circumstances of the case sufficiently appear in their Lordships' judgment.

The issues settled in the case were,

1. Whether the houses and sites claimed appertain to the zemindary, and as such are the property of the Plaintiff, the zemindar, or are the property of Defendants;

2. Whether this suit is barred;

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, and SIR ROBERT P. COLLIER.

3. Whether this suit has been properly valued;

4. Whether the Plaintiff is barred under s. 2 of the *Civil Procedure Code* from bringing this suit in respect of all or any of the property now sued for by reason of the cause of action or any part thereof having been previously heard and determined by a Court of competent jurisdiction in a former suit between the same parties, or between parties under whom they claim.

J. B. Norton, and *Mayne* (*Eardley Norton* with them), for the Appellants.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal in a suit brought by the Plaintiff to recover possession of certain houses and grounds appertaining thereto, situate in the fort of *Pittapuram*, which he claimed as part of his zemindary of *Pittapuram*. He stated in his plaint that his father, "*Sri Raja Row* (late) *Venkata Surya Row Bahadur*, and the Defendants' father, *Sri Rajah Row* (late) *Kumara Venkata Row Bahadur*, were brothers, of whom the Plaintiff's father, who was elder, succeeded to the ancient zemindary of *Pittapuram* belonging to their father, *Sri Rajah* (late) *Niladri Row Bahadur*; and after him the Plaintiff became his successor." He further said, "As the Plaintiff's paternal grandmother, *Sri Raja Row* (late) *Bhavayyamma Garu*, was a member of the Plaintiff's family, she lived in some of the houses within the fort of *Pittapuram* belonging to the Plaintiff, and had in her use some grounds appertaining to that fort; and while so she died on the 11th of March, 1870. The Defendants retained the said houses and grounds in their possession even after her death, on the ground of their having occupied them with her until her death; and although the Plaintiff demanded them to surrender them up to the Plaintiff in July, 1870, they have not done so yet; and therefore the cause of action arose in that month."

The Defendants, in their written statement, set up in defence that the claim was barred by the *Statute of Limitations*; and, further, they stated that they were entitled to the property in dispute, and that the Plaintiff had no right to recover the same on the pretext that the property formed a part of his zemindary

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In paragraph 3 they said, "The Plaintiff brought the suit No. 4 of 1862 on the file of the late Civil Court against the Defendant's father, and others, for a decree establishing his right to these houses and other property; and the said suit having been dismissed, he has now again brought this suit for the said houses; and this suit is therefore opposed to sect. 2 of the Code of Civil Procedure." Upon that an issue was raised whether the Plaintiff was barred under sect. 2 of the Civil Procedure Code from bringing the suit by reason of the cause of action or any part thereof having been previously heard and determined by a Court of competent jurisdiction in a former suit between the same parties or parties under whom they claim.

The principal question in this appeal is, whether the right to recover the property in suit was determined in a former suit, and whether, as regards that property, it was a suit between the same parties or parties under whom they claim.

The former suit was brought in 1862 against the widow of *Niladri Row*, the grandfather of the Plaintiff, and also against the father of the Defendants and the sister of their father.

The grounds were, first, that the widow had misappropriated certain moveable property belonging to the estate of her deceased husband *Niladri*, and had with part of the proceeds thereof purchased certain muttas described in No. 1 of the particulars annexed to the plaint, and had alienated the same to the co-Defendants by deed of gift; secondly, that the lands described in No. 2 of the said particulars were sree lands to which she was entitled only for life by way of maintenance, but that she had executed a document transferring them to the co-Defendants as a gift,

There was also another item in the particulars, No. 3, described as "An upstair house situated within the fort of *Pittapuram* belonging to the Plaintiff, and valued at Rs.4000, together with three houses attached thereto, as well as a yard and compound.

There is no doubt as to the fact that the property mentioned in No. 3 is the same property as that which is now sought to be recovered. As regards the properties described as Nos. 1 and 2, the Plaintiff sought, amongst other things, to have the deeds of gift cancelled, to recover possession of No. 1, and for a prohibition against the alienation of property No. 2. As regards the property

described in No. 3, and which was sought to be recovered in the present suit, there was no distinct allegation of fact either in the plaint or in the written statement, nor anything to connect the present Defendants' father therewith, or to disclose any claim thereto on the part of the Plaintiff; and their Lordships have come to the conclusion that substantially the relief sought in respect of it was, as stated by the High Court, to restrain the widow from acts of waste.

As regards Nos. 1 and 2, which are not the subject of the present suit, they had been assigned by the widow to the co-Defendants, who, of course, were interested in them, and necessary parties to the suit; but as regards the houses and other property the subject of the present suit there was no charge that she had ever assigned or that she intended to assign them to the co-Defendants, nor any allegation to shew that the co-Defendants had any interest whatever in them.

As regards that portion of the property, then, to which this suit relates, and as to which the High Court considered the former suit was one to restrain waste, the widow was substantially the only Defendant, and her co-Defendants were no parties to the suit.

No issue was raised nor any evidence offered on either side in respect of that part of the property, either to shew that the plaintiff was entitled to an injunction or for any other purpose, and the Plaintiff's suit was dismissed. The High Court, on appeal, affirmed the judgment. They said: "The judgment must be affirmed with respect to the houses and premises described as No. 3, there being no evidence whatever relating to this head of claim." Under these circumstances their Lordships are of opinion that the decision in the former suit was not a decision in a suit between the same parties or parties under whom they claim establishing the right of the Defendants in the former suit to the property in question in the present suit, and that the cause of action in the present suit was not determined in the former suit.

The issue as to *res judicata*, however, was not the only issue in the present suit; other issues were raised. The first was, "Whether the houses and sites claimed appertain to the zemin-

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dary, and, as such, are the property of the Plaintiff, the zemindar, or are the property of the Defendants." The Judge of the first Court did not determine that issue. He said: "I find in the affirmative on the fourth issue" (that is, the issue as to *res judicata*); "and with the evidence before me, under which I hold the Plaintiff estopped from bringing this suit, I could not but find, were it necessary to record a finding, against the Plaintiff on the first issue." As regards the estoppel, the same principle which applies to *res judicata* must apply to that; the parties were not bound by the estoppel, inasmuch as the former suit was not substantially, as regards the houses and property in the present suit, a suit between the same parties, nor was there in it a claim or a decision as to the right.

There was also another issue, namely, whether the suit is barred by limitation. As regards that issue the Judge of the first Court says: "To sum up, I find that the grandmother of the Defendants, and her son, and afterwards her son's sons, lived together in the premises now sued for as their principal place of residence, not only from 1835, as stated by the Defendants, nor from 1845, as stated by the Plaintiff, but the grandmother and her son lived there from and before the death of *Niladri Row* in 1828, and continuously, with but few breaks or visits at times." There is, however, no express finding as to the title under which the mother remained in possession. If the houses were part of the zemindary which descended to the Plaintiff, it would be important to ascertain whether the mother remained in possession by reason of an agreement or other arrangement by which she was to be allowed to remain there for her life as her place of residence, or whether she continued there as a trespasser holding the property as in her own right. There has been no finding upon that point, and therefore it will be necessary to have it determined. If she held in her own right or as a trespasser, then the *Statute of Limitations* would be a bar, but if she held under an arrangement by which she was allowed to remain there for her life, the occupation during her life would not be a bar to the present suit, inasmuch as she died within the period of limitation.

As regards the first and second issues, therefore, their Lordships think that under all the circumstances the case ought to be

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remanded to the High Court to determine them, and this more especially as the Respondents are not present to argue the case upon the evidence.

Under these circumstances their Lordships will humbly advise Her Majesty that the finding upon the fourth issue be set aside, and the decree of the High Court be reversed, and that the case be remitted to the High Court to determine the first and second issues, and to decide the case upon the merits.

The costs of this appeal will be taxed here, and are to be costs in the cause.

Solicitors for the Appellant: *Gregory, Rowcliffes, & Rawle.*

SYUD BAZAYET HOSSEIN AND OTHERS . . DEFENDANTS;

AND

DOOLI CHUND . . . . . PLAINTIFF.

MOULVIE MAHOMED WAJID . . . . DEFENDANT;

AND

SYUD BAZAYET HOSSEIN AND OTHERS . . PLAINTIFFS.

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ON APPEAL FROM THE HIGH COURT AT BENGAL.

Mahomedan Law— Dower—Alienation by Heir to bonâ fide Purchaser.

A creditor of a deceased Mahomedan whether in respect of dower or otherwise cannot follow his estate into the hands of a *bonâ fide* purchaser for value to whom it has been alienated by his heir-at-law, whether by sale or mortgage.

Mussumut Wahidunnissa v. *Mussumut Shabrattun* (1) approved.

Such alienee is bound by any decree charging the estate passed in a suit against the heir, pending at the date of alienation.

THE first of these appeals was from an order of the High Court passed on special appeal (May 23, 1873), which substantially

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) 6 Beng. L. R. 54.

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affirmed a decree of the Judge of *Gya* (March 27, 1872) in favour of the Respondent, who sued for self and as guardian of his minor brothers, heirs of *Greedhur Lall*, the purchaser at a sale in execution of the mouzah in suit.

The facts of the case are stated in the first of the two judgments of their Lordships printed below.

The judgment of the High Court (*Phear* and *Ainslie*, JJ.) was as follows:—

"This seems to be an extremely plain case. One *Khorshed Ali*, a Mahomedan gentleman, died in October, 1865, leaving *Najmooddin*, his son, and three widows as his heir and heiresses. The three widows also had a right to dower.

"In June, 1866, the son *Najmooddin* being in possession, as I understand, substantially of the whole of the deceased's property, mortgaged it under the designation, which we have heard much discussed, of his milkiut mokurruri,—8 annas' share of certain property—to secure the repayment of a sum of money which had been advanced to him by the mortgagee. At that time the widows had not made a specific claim upon *Najmooddin* for their dower. But in the following year, namely, in 1867, they brought a suit against him to assert their right of dower, and they succeeded in getting a decree against him in that suit in June, 1867.

"It appears to me that it is now settled by several decisions that the Mahomedan widow's right to dower against the estate of her deceased husband is generally speaking simply in the situation of a debt which she like any other creditor can take legal measures to enforce against such property of her husband as she can find in the hands of the heirs, or even in the hands of any other persons, provided these have taken as volunteers or with notice of her making a specific claim against that property. No doubt if she is herself in possession of the property she is entitled to assert a lien upon it in respect of her own debt against the other heirs, and to pay herself her own debt before she pays the debt of any one else. But if she is not in possession of the property, and if she is forced to take proceedings in order to liquidate the debt out of her husband's property, she is, until those proceedings have ripened into some act of Court against the property, simply in the position of an ordinary creditor.

"Thus it seems to me that in this case until the widows brought their suit in 1867, the deceased person's property in the hands of *Najmooddin* was not subject to a lien or charge in favour of the three widows. Therefore, when *Najmooddin* pledged the property in June, 1866, so far as his own share as heir in the property was concerned, he was able to pass it free from all incumbrances to a *bonâ fide* purchaser for valuable consideration. It may be that the money for which an heir under such circumstances as these alienes his share, is taken for the purpose of discharging his ancestor's debt, and I do not think that the purchaser is bound to see to the application of the money. It is not contended here that the mortgagee who took by the bond of June, 1866, was not a *bonâ fide* purchaser and did not give valuable consideration. He was therefore entitled, as I think without doubt, to the benefit of this mortgage to the full extent of *Najmooddin's* own share notwithstanding the subsequent proceedings which were taken by the widows to assert their right for dower, and which culminated in a decree in their favour in June, 1867. The mortgagee did take proceedings in 1867 to enforce and make good his charge upon the property upon the footing of this bond; a decree for sale was made; and under that decree of sale the present Plaintiff, an entire stranger to all the before-mentioned proceedings, bought in August, 1869.

"The result of this purchase is, I think, that the present plaintiff became entitled by virtue of the title initiated by the bond of June, 1866, to as much of the property as *Najmooddin* himself as heir could pass, provided the terms of the bond extended to that length."

C. W. Arathoon, for the Appellants, contended that, according to Mahomedan law, *Najmooddin*, as heir to *Khorshed Ali*, was not entitled to his share of the inheritance until his father's debts were satisfied. His power to alienate did not arise until the debts were satisfied; otherwise the alienee took subject to the unpaid debts of the father. This was a mortgage by the heir and not a sale, and it related to the mokurruri right of *Najmooddin*, which he held not in his own right but benamee for his father. The doctrine of *lis pendens* applies as regards the alienation by

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Najmooddin. Moreover, the Respondent in any view of the case bought subject to the decree of the High Court of the 11th of June, 1868, which bound the estate, and had directed that the residue thereof should be divided "when all the debts due by the estate of *Khorshed Ali* shall have been paid and satisfied." He referred to *Macnaghten's* Principles of Mahomedan Law, pp. 59, 94, 275, 278. [*Graham* referred to *Mussamut Bebee Bachun* v. *Sheikh Hamid Hossein* (1).] *Mussamut Humeeda* v. *Mussamut Budlan* (2); *Unnopoorna Dossee* v. *Gunganarain Paul* (3).

Graham contended that *Greedhur Lall*, through whom the Respondent claimed, purchased the right and interest of *Najmooddin, bonâ fide* and without notice and for valuable consideration. The title of the Respondent to the right and interest of *Najmooddin* is superior to that acquired by the Appellants under the decree of the 11th of June, 1868, or otherwise. It has been attempted to distinguish between a mortgage and a sale and to rely on the doctrine of *lis pendens;* but the mortgage was prior to any proceedings taken by the widows. The son having possession of and title to the property mortgaged to the Respondent's vendor, and then it is contended that in consequence of what happened after that date the estate is charged with debt to the Appellants. Whether *Najmooddin* held benamee or not, the mortgagee believed that the son had the mokurruri from his father. The Appellants cannot take advantage of the fraud of *Khorshed* to oust the mortgagee. Assuming that the mokurruri as a benamee transaction would be set aside, then the property would become part of *Khorshed's* estate descendible to his heirs at his death. It was competent to the heir to aliene to a *bonâ fide* alienee without paying the debts. *Macnaghten's* texts are not to the effect that dower constitutes a lien; they are examined by *Macpherson*, J., in *Mir Mahar Ali* v. *Amani* (4); see also *Bibee Mehran* v. *Mussamat Kubiran* (5); *Mussamut Wahidunnissa* v. *Mussamut Shabrattan* (6). A lien for dower only arises where the estate has been expressly

(1) 14 Moore's Ind. App. Ca. 383.
(2) 17 Suth. W. R. 525.
(3) 2 Suth. W. R. 296.
(4) 2 Beng. L. R 307; S. C. 11 Suth. W. R. 212.
(5) 6 Beng. L. R. 60.
(6) 6 Beng. L. R. 54.

hypothecated for that purpose; see *Ameeroonnissa* v. *Mooradoonnissa* (1); *Sayad Umed Ali* v. *Mussamat Saffiham* (2). Reference was also made to *Sugden's* Vendors and Purchasers [Ed. 1862] p. 655, to shew that by English law an alienation by the heir is good against specialty creditors.

Arathoon replied.

The second of these appeals was from a decree of the High Court (April, 1874) which reversed that of the Subordinate Judge of *Gya* (June 19, 1873). The questions arising were as to which of the contending purchasers at auction sales of the mouzah in suit which also was part of *Khorshed Ali's* estate, held in execution of different decrees against the same judgment debtor, was to have precedence over the others under the circumstances stated in the two judgments of their Lordships printed below.

The judgment of the High Court (*Phear* and *Morris*, JJ.) was as follows:—

"The final decree made by the High Court was put into the form of an ordinary administration decree, and directed *Najmooddin* to account for the property of *Khorshed Ali* which was in his hands, and also to pay over the value in money of such property of *Khorshed Ali* which had been in his hands and which he had misappropriated.

"I need hardly say that a decree of this kind directing the person in whose hands the property was to account for it in order that it might be applied to the purpose of discharging the debts due from *Khorshed Ali*, was a decree against that property, and operative to bind it in the hands of *Najmooddin*, and therefore of any other person who took from *Najmooddin* with notice of the decree, or under such circumstances as to make him affected by the doctrine of *lis pendens*.

"Now while these suits were pending, and after the Plaintiffs in these two suits had recovered the decree against the property in the hands of *Najmooddin* to the full extent of their claim, from the Court of first instance, namely, on the 13th of October, 1867,

(1) 6 Moore's Ind. App. Ca. 211. (2) 7 Beng. L. R., A. C. 28.

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Najmooddin affected to create a lien upon the particular property which is the subject of this suit, and which is part of the property of *Khorshed Ali* come to his hands as heir on the death of *Khorshed Ali*, by a specially registered money bond made in favour of *Abdool Aziz* the son of *Mahomed Wajid*, the first Defendant in the present suit. After the final decree which the High Court made in these suits on the 11th of June, 1868, *Abdool Aziz* obtained in the summary mode provided by the late *Registration Act*, a money decree upon the footing of the specially registered bond. This was on the 4th of August, 1868. And on the 7th of September following he attached the property which is the subject of suit, and which the specially registered bond itself purported to bind; and afterwards he sold the property so attached in execution of that decree to the Defendant No. 1, *Mahomed Wajid* his father.

"Now it seems to be quite clear upon the facts which I have stated that *Mahomed Wajid*, the first Defendant who purchased in execution of the decree upon the specially registered bond, at the best obtained a title to the property subject to the operation and effect of the High Court decree of the 11th of June, 1868, upon that property as being part of the property which constituted the assets of *Khorshed Ali* at that time in the hands of *Najmooddin*. But that was a decree in an administration suit directing *Najmooddin* to account for that property in order that it might be administered by the Court to meet the claims of the Plaintiffs in that suit and of other creditors of *Khorshed Ali*. I say that *Mahomed Wajid* at best took a title subject to the effect of this decree, because if the specially registered bond be taken as the root of his title it disclosed the fact of the existence of these two suits and expressly stated that the property the subject of the bond was thereby pledged for the purpose of raising money to enable *Najmooddin* to carry on the appeals in those suits; if not, then he obtained by his purchase only the right, title and interest of *Najmooddin* in the property whatever that might be.

"After the date when *Mahomed Wajid* purchased this property in the manner I have mentioned, the Plaintiff *Tayyuban* in execution, as it is said, of the High Court decree which she had obtained in her suit, caused the property which is the subject of this suit to be put up for sale. And at that sale the three principal Plaintiffs,

Zuhrun, Begum, and *Tayyubun*, purchased it. Now this was a sale which was effected by the Court which was charged with the duty of executing the decree of the High Court: and that decree, as I have already endeavoured to explain, was a decree for the administration of the assets of *Khorshed Ali* in the hands of *Najmooddin* at the time when the decree was passed for the purposes of therewith discharging his debts; and the property which is the subject of suit is admittedly part of those assets. This sale, therefore, was an act of the Court administering those assets of *Khorshed Ali* in respect of which the administration decree had already been pronounced. The effect of that sale must therefore be to pass such title to the property as could be given by the Court at the time when the decree was passed. And inasmuch as the mortgage deed upon which the Defendant's claim is based was made by *Najmooddin* pending the suit in which the administration decree against him was made, the Court could at the time when the decree was passed give a title free of that incumbrance, whatever the incumbrance in itself might otherwise be worth.

"And *Mahomed Wajid* cannot even claim the benefit of this incumbrance, such as it may be, because the summary decree in execution of which he made his purchase could not affect the property pledged, and all he could obtain under his purchase was the right and interest of *Najmooddin* as it stood at the time of the execution sale, *i.e.*, at a time when the High Court administration decree had been passed against him.

"It thus seems to be clear that the Plaintiffs have got a title to the property in suit which is prior to the title, if any, which the Defendants have set up; and therefore they are entitled to recover.

"It has been argued before us that when *Mussamat Tayyuban* took out the execution under which the sale to the Plaintiffs was effected, she was not probably entitled to do so according to the terms of the High Court decree; also that in carrying into effect the administration decree the assets ought to have been marshalled in such a way as would have left the property now in suit unsold. But these objections cannot be entertained in this suit. The Defendant had the opportunity of putting them forward in the execution proceedings of the administration suit, and we under-

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stand that he did so without success. And no ground has been suggested as between the present Plaintiffs and the Defendant *Mahomed Wajid*, upon which it would be inequitable that the Plaintiffs should be allowed to assert their title."

Leith, Q.C., and *Doyne*, for the Appellant, contended that the Plaintiffs' suits were, so far as their claims for dower were concerned, ordinary creditors' suits, and did not prevent *Najmpoddin*, who was in possession during their pendency, from dealing as he did *bonâ fide* with his own interest in his father's estate. In other words, *lis pendens* merely would not operate against the validity of the mortgage. [SIR MONTAGUE E. SMITH:—The effect of *lis pendens* is that, pending litigation, the party shall not alienate: see *Metcalfe* v. *Pulvertoft* (1).] Reference was then made to *Campbell* v. *Delaney* (2); *Shah Enaet Hossain* v. *Syud Rumzan* (3). The Respondents could not in equity seek to oust one who was in legal possession, without shewing that their claim could not be satisfied out of other portions of the estate. [SIR MONTAGUE E. SMITH:—If this objection had been taken in the Courts below it could have been dealt with.] It was for the Respondents to prove their case and shew that they were entitled to follow the property in suit.

It is said that there were certain prohibitory orders in force at the time of the mortgage. The Appellants, however, contend that the only possible proceeding that can be specifically relied on by the Respondents is the order made under sect. 92 of Act VIII. of 1859, and the attachment made in September, 1868, both of which were prior to the mortgage: see *Ijoboo Sahoo* v. *Ramchurn Roy* (4).

Arathoon, for the Respondents, was not called upon.

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The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

The first of these appeals is from an order of a Division Bench of the High Court of *Calcutta*, passed on special appeal. The order is dated the 23rd of May, 1873, and modified an order of

(1) 2 V. & B. 200.
(2) Marshall's Rep. 509.
(3) 10 Suth. W. R. 216.
(4) 11 Suth. W. R. 517.

the Judge of zillah *Gya*, dated the 27th of March, 1872, which last-mentioned order reversed that of the subordinate Judge, dated the 29th of July, 1871, and made in the Appellant's favour.

The suit was instituted by the Respondents to establish their titles as purchasers in execution of a decree obtained by them against *Najmooddin* of 14 annas of mouzah *Bhojepore* in mehal *Rewai Taturia*, in zillah *Gya*, and to recover possession thereof.

The suit was brought under these circumstances: *Khorshed Aly*, a Mahomedan of the Soonee sect, died in October, 1865. He left three widows, *Mussamat Zohrun*, *Mussamat Begum*, and *Mussamat Tayyuban* He also left a son named *Najmooddin*, who it was contended was not the legitimate son of his father (but whose title has since been established in the suit), and a sister.

The son's title having been established as the legitimate son and heir of his father, the three widows became entitled under the Mahomedan law as sharers to one-eighth of the estate of their deceased husband, and the son *Najmooddin* to seventh-eighths of the estate. The son claimed the whole property under a mokurruri which he alleged had been granted to him by his father on the 16th of March, 1862. The widows claimed large sums of money on account of dower; but on the 13th of June, 1866, before any proceedings had been taken by the widows to recover their dower, *Najmooddin*, the son, executed a mortgage bond in favour of *Situl Persad* for Rs.4890. The bond was dated the 13th of June, 1866, and was as follows:—"Whereas Rs.1295, under a bond dated the 14th of February, 1866, A.D., Rs. 1000, the principal amount under a registered bond, dated the 18th of May, *idem*, and Rs.118. 4*a*., the interest on the aforesaid two bonds, in all Rs 2413. 4*a*., are justly due to *Baboo Situl Persad*, son of *Baboo Ajoodhai Lal* 'mahajun' (banker), by caste an Agurwala, inhabitant of *Kusba Sahebgunge*, pergunnah and zillah *Gya*, from me the declarant; and at present having taken Rs.2386. 12*a*. in cash for payment of the rents of the mouzahs held in lease and mokurruri from the Ranis, the wives of *Rajah Modh Narain Sing*,"—referring to a mokurruri held by the father himself, as to a portion of the estate,—"hence cancelling the former bonds, I execute this bond for Rs.4800, and declare and give in writing, that I shall repay the said amount, principal, with interest at two

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per cent. per mensem, in full on the 30th of Magh, 1274" corresponding with 1867—"to the Baboo aforesaid. As a guarantee for the payment of the amount in question, I mortgage 8 annas of the entire 16 annas of mehal *Rewai Taturia*, pergunnah *Muhair*, zillah *Gya*, which I have as my property, and mokurruri in my possession and holding up to the date of the execution of this deed. As long as the amount in question, principal with interest, is not repaid, I or my heirs shall not transfer the same by sale, conditional sale, gift, or mortgage, or convey it in any other way to anybody else. Should I and they do so, the same will be null and void." Then at the end of the bond, "For the further satisfaction of the banker:"—that is, of *Situl*,—"I have kept a mokurruri pottah, dated the 16th of March, 1862, A.D., of the mehal mortgaged in this bond by the banker," meaning that he had deposited with the banker the mokurruri under which he claimed to hold the whole estate from his father.

Some question has arisen upon the construction of this bond, whether it was merely a mortgage of the mokurruri which he alleged to have held from his father, or whether it was a mortgage of his estate so far as he could charge it.

Their Lordships are of opinion that the mortgage operated to transfer his interest in the estate, and not merely the mokurruri which he alleged had been granted to him by his father. It is important to determine this question, because in a subsequent proceeding, to which advertence will presently be made, the mokurruri alleged to have been granted to him by his father was held to have been made merely benamee for the benefit of the father. The mortgage was on the 13th of June, 1866. At that time, if *Najmooddin* were the legitimate son of the deceased, —and it has now been decided that he was,—he had the right to convey his own share of the inheritance, and was able to pass a good title to the alienee, notwithstanding any debts which might be due from his deceased father.

For that position the 6th *Bengal* Law Reports, p. 54, was cited as an authority. In that case the share of an heir was seized and sold in execution of a decree against the heir in his individual and not in his representative capacity, and it was held that the purchaser had a right to hold the property against a creditor of the

ancestor who had obtained a decree for her debt before the seizure in execution. In that case the creditor was the widow of a deceased Mahomedan, and her claim was in respect of dower. The principle of that case is applicable to the present, and the ruling is quite in accordance with the English law applicable to heirs and devisees as to real estate, and to executors as regards personalty. In *Sugden* on Vendors and Purchasers, p. 655, the edition of 1862, it is laid down that, "although an heir-at-law is bound by specialty debts in respect of lands descended, yet a purchaser of those lands, without notice of any debts, was never holden to be subject to them." In *Williams* on Executors, at p. 872, a similar rule of law is laid down with regard to executors. It is said, "It is a general rule of law and equity that an executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate, and that they cannot be followed by creditors into the hands of the alienee. The principle is, that the executor or administrator in many instances must sell in order to perform his duty in paying debts, &c., and no one would deal with an executor or administrator if liable afterwards to be called to account."

In the present case, in the course of the argument a distinction was attempted to be drawn by the learned counsel for the Appellant between an absolute sale and a mortgage; but it appears to their Lordships that there is no valid distinction in this respect. An executor may very properly mortgage a portion of the assets of his testator for the purpose of raising money to pay debts, and in many cases it may be very beneficial to the estate that such a course should be adopted.

In *Williams* on Executors, p. 873, it is said, "As an executor may absolutely dispose of the testator's assets for the general purposes of the will, there seems no good reason why, in the exercise of a sound discretion, and presuming the language of the will does not peremptorily require an absolute sale, the executor may not raise the money required by a partial sale or mortgage of the assets."

In *Campbell* v. *Delaney* (1): "The heirs of a deceased Mahomedan mortgaged some property of their ancestor. After the mortgage

(1) Marshall's Rep. 509.

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a judgment creditor, in respect of a debt due from the estate of their ancestor, attached and sold the mortgaged property in execution of his decree. Held, that the sale was subject to the mortgage."

Their Lordships entirely concur in the view of the law which was laid down in the case cited from the 6th *Bengal* Law Reports, and the other authorities cited, and are of opinion that a creditor of a deceased Mahomedan cannot follow his estate into the hands of a *bonâ fide* purchaser for value to whom it has been alienated by his heir-at-law.

That being the law, it is necessary now to refer to what took place.

After the mortgage bond had been executed by *Najmooddin*, two of the widows, viz, *Mussamat Zohrun* and *Mussamat Begum*, instituted a suit against *Najmooddin*, and also against the sister of the deceased, who would have been entitled as an heir of the deceased in case *Najmooddin* was not a legitimate son. They sued to set aside the mokurruri under which the son claimed to be entitled to the whole estate from his father; to declare that he was a mere stranger; and they prayed for an order that possession of the estate should be recovered by them, and that the dower which they claimed should be paid out of the estate.

Lengthened proceedings took place in that suit, and ultimately on the 11th of June, 1868, the High Court, upon appeal by *Najmooddin* against whom a decree had been made in the lower Court, made the following decree: "That the Appellant is the legitimate son and an heir of *Khorshed Ali*, deceased; that the Appellant must account for the assets of the estate of *Khorshed Ali* which have come to his hands, and that to the extent of these assets he is liable to pay the amount due to the Plaintiffs *Zohrun* and *Begum* in respect of their dower, the said *Zohrun* and *Begum*, in respect of their claim, ranking *pari passu* with other ordinary creditors of the estate. When the debts due by the estate of *Khorshed Ali* shall have been satisfied, the residue is to be divided between the heirs, who are *Najmooddin* and the three widows *Zohrun*, *Begum*, and *Tayyuban*, in the shares to which they are by Mahomedan law entitled."

After the suit had been instituted by the first two widows,

Tayyuban, the other widow, brought a similar suit, and obtained a similar decree in the High Court. Under the decrees in the suits by the widows executions were issued, and the share of *Khorshed Ali* in the property in question, mouzah *Bhojepore*, was attached as part of the assets of their deceased husband.

On the 26th of June, 1867, *Situl Persad* sued *Najmooddin* on the mortgage bond, and obtained a decree in that suit, by which it was ordered that the sum due on the bond should be realized from the property mortgaged, and other property of the Defendant.

The present Respondent derived title under a sale of the mortgaged property in execution of that decree, and the High Court upheld his right to it. It should be remarked that several decrees and orders, both interlocutory and final, were made in the suits of the widows, and that the property in suit was attached in those suits long before it was attached in *Situl's* suit. But their Lordships consider that this is immaterial, and that it is unnecessary to refer to the several proceedings in the suits of the widows, because they are of opinion that the bond which was executed by *Najmooddin* to *Situl* gave him a title to the estate which had been mortgaged by the bond before the institution of the suits by the widows, and that the rights of *Situl* and of those who claim under the sale in execution of his decree are not affected by any of the proceedings in the widows' suits.

Their Lordships are of opinion that the decree of the High Court was correct, and they will humbly advise Her Majesty that the judgment and decree be affirmed and the appeal dismissed with costs.

The second appeal to which this judgment relates is similar to the preceding case instituted by *Bazayet Hossein* and others against *Dooli Chund*, with one exception.

The Appellant claimed under a sale in execution of a decree upon a mortgage bond executed by *Najmooddin* to *Abdool Aziz* on the 13th of October, 1867. The great distinction between this case and the other is that in the present case the mortgage bond was executed pending the suits brought by the widows, whereas in the other case the mortgage bond was executed before the institu-

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tion of the widows' suits. In this case the widows claim under a purchase in execution of the decree of the widow *Tayyuban*, the effect of which was stated in the judgment in the other appeal. The High Court held that the purchaser under the decree upon the mortgage bond was bound by the decree of the widow, inasmuch as the mortgage had been executed during the pendency of the widow's suit. Mr. Justice *Phear*, in delivering judgment, says, "I need hardly say that a decree of this kind, directing the person in whose hands the property was, to account for it in order that it might be applied for the purpose of discharging the debts due from *Khorshed Ali*, was a decree against that property, and operative to bind it in the hands of *Najmooddin*, and therefore of any other person who took from *Najmooddin* with notice of the decree, or under such circumstances as to make him affected by the doctrine of *lis pendens*."

Their Lordships agree in that view of the law, and are of opinion that the Appellant in this case was bound by the decree obtained by the widow *Tayyuban*.

A question was raised in the course of the argument as to whether the decree of the High Court warranted the execution which the widow took out; and whether some further order of the Court was not necessary before execution could be issued upon it. No application, however, was ever made to set aside the execution upon the ground that it was not warranted by the decree of the High Court, nor was any point of this kind taken in the Lower Court. Under these circumstances their Lordships are of opinion that that point cannot now be taken.

They, therefore, hold that *Abdool Aziz* and all persons claiming under him, or under the sale in execution of the decree upon his bond, were bound by the decree of the High Court in the suit instituted by the widows before the bond was executed.

Under those circumstances they will humbly advise Her Majesty to affirm the decision of the High Court and to dismiss this appeal with costs.

Solicitor for *Syud Bayazet Hossein: T. L. Wilson.*
Solicitors for *Dooli Chund: Watkins & Lattey.*
Solicitors for *Moulvie Mahomed Wajid: Barrow & Barton.*

THE MAHARAJAH OF BULRAMPUR . . DEFENDANT;
AND
UMAN PAL SINGH AND GANESH SINGH. PLAINTIFFS.

J. C.*
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Nov. 19.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Act XXVI. of 1866—*Sub-Settlement*—"*Holding under Contract.*"

Under-tenures held under contract, or under any arrangements from which a contract may be inferred, are within the definition of sub-proprietary rights given in the rules annexed to Act XXVI. of 1866, and their holders are entitled to a sub-settlement.

APPEAL from a decree of the Judicial Commissioner of *Oudh* (Feb. 12, 1875) affirming a decree of the Court of the *Fyzabad* Division of *Oudh* (Oct. 27, 1874), which had dismissed an appeal preferred by the Appellant against the order of the Settlement Officer of *Gonda* (June 13, 1874), and modified an order in favour of the Respondents on a cross appeal filed by them.

The question decided in this appeal was whether the Respondents were, under the rules scheduled to Act XXVI. of 1876, entitled to a sub-settlement for certain villages in respect of under-proprietary rights held under the Appellant. The nature of the case sufficiently appears in the judgment of their Lordships.

Cowie, Q.C., and *Graham*, for the Appellant.

The Respondent did not appear.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

In this case the Settlement officer has found that the Respondents are entitled to a sub-settlement for certain villages in respect of under-proprietary rights held under the Maharajah of

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Bulrampur. The Commissioner of *Fyzabad* has confirmed that finding; and upon appeal to the Judicial Commissioner, he saw no reason to disturb it.

The question turns upon the construction of Act XXVI. of 1866, and the rules, which have the effect of legislative rules, scheduled in that Act.

It appears that the Raj of *Bulrampur* is a large and ancient estate, and that these Respondents have held the villages—a part of that large Raj—for a very considerable period of time. The documentary evidence shews that they have been in possession from at least as early as the year 1771. Mr. *Cowie* admits that they held as sub-tenants; that there was an under-tenure under which they legally held the villages; and the only question is whether they held so as to bring their under-tenures within the definition of sub-proprietary rights given in the rules annexed to Act XXVI. of 1866.

The rules are not very clearly worded, but they seem sufficiently clear to enable a plain decision to be given in this case. Rule 2 says, "To entitle a claimant to obtain a sub-settlement he must shew that he possesses an under-proprietary right in the lands of which the sub-settlement is claimed, and that such right has been kept alive over the whole area claimed within the period of limitation." It is not necessary to inquire what "the period of limitation" means, for no question of limitation arises. The important part of Rule No. 2 is, "He must also shew that he, either by himself or by some other person or persons from whom he has inherited, has by virtue of his under-proprietary right, and not merely through privilege granted on account of service or by favour of the talookdar, held such lands under contract (pucka) with some degree of continuousness since the village came into the talooka." "Some degree of continuousness" is a vague phrase, but No. 3 supplies a definition of it. Rule No. 3 is, "The words 'with some degree of continuousness' will be interpreted as follows: If the village was included in the talooka before the 13th of February, 1836"—and this village falls within that category—"the lease must have been held for not less than twelve years between that date and the annexation of the province." Undoubtedly, if there was a holding under contract in this case, the

necessary degree of continuousness has been satisfied; and the only question is, whether or no there was sufficient evidence that these lands were held "under contract (pucka)."

Mr. *Cowie* has referred to some of the documentary evidence which appears to shew that they were held under what are called leases. The Settlement Officer has found that that holding was, within the meaning of these rules, a holding under contract. Their Lordships think, supposing the evidence supports his finding as to the lease, and being confirmed by the Commissioner they are not disposed to look too narrowly at the facts, that in point of law the decision is correct. The terms "holding under contract" embrace any holding under arrangements from which a contract may be inferred. Then the Settlement Officer has found that the land was not granted "on account of service or by favour of the talookdar."

Their Lordships having looked at the judgments of the Settlement Officer and of the Commissioner of *Fyzabad*, have observed that both those officers took very considerable pains to arrive at a correct conclusion in this case; and their Lordships see no reason whatever to suppose that they have not come to a correct decision.

Their Lordships will therefore humbly advise Her Majesty to affirm the decrees appealed from, and to dismiss this appeal.

Solicitors for the Appellant: *Watkins & Lattey.*

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JOY NARAIN GIRI . . . . . PLAINTIFF;

AND

GRISH CHUNDER MYTI . . . . . DEFENDANT.

AND

JOY NARAIN GIRI . . . . . DEFENDANT;

AND

GRISH CHUNDER MYTI . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT OF BENGAL.

Mitakshara Law—Partition.

Although a suit does not actually in terms seek a partition, yet if it indicates a distinct intention, and the decree gives effect thereto, of obtaining a separation in estate, such decree effects a partition, at least as regards the joint title.

Appovier v. *Rama Subba Aiyan* (1) approved.

THIS was a consolidated appeal from a judgment (April 25, 1876) of the High Court, and two decrees based thereon, dismissing appeals against a judgment of the Court of District *Midnapoor* (July 29, 1874), which dismissed the Appellant's suit with costs, and against a judgment of the same Court (July 27, 1874), which permitted execution of an order of Her Majesty in Council, made in a suit wherein one *Shibpershad Giri* was Plaintiff and the Appellant was Defendant.

On the 6th of March, 1866, one *Shibpershad Giri* sued the Appellant for the recovery of possession with mesne profits of a moiety of certain properties which he alleged were the joint and ancestral estate of himself and the Appellant, having been acquired by their grandfather, *Nund Kishore Giri*, from whom they had descended to them, and from which he asserted he had been ousted by the Appellant. The plaint filed in the suit contained no prayer for partition. The decree awarded possession of

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) 11 Moore's Ind. Ap. Ca. 75.

one moiety of the estate to *Shibpershad Giri*, with mesne profits. It contained no direction for the partition of the estate. It was affirmed by the High Court, and subsequently by the Privy Council.

Pending the appeal to the Privy Council *Shibpershad* died, and the Appellant applied that his widow should be substituted for him on the record, stating that she represented the estate of the deceased by right of heirship. The High Court, however, substituted the Respondent, who claimed to be entitled under *Shibpershad's* will. After the dismissal of the appeal to the Privy Council the Respondent endeavoured to execute the decree, and to oust the Appellant from one moiety of the estate.

Subsequently, on the 18th of July, 1873, the Appellant filed his plaint against the Respondent, *Grish Chunder*, who claimed under the said will, *Taramoni Dosi*, the widow of *Shibpershad*, and also against the daughter and mother of *Shibpershad*, alleging that there had been no partition of the estate and effects, and that the will under which *Grish Chunder* claimed had never been executed, and was inoperative even if it had been executed. He prayed that it might be set aside, and that he might be declared heir by survivorship to the moiety of the ancestral estate, and for possession; and in the event of a separation in estate being held to have taken place between himself and *Shibpershad Giri*, he might be appointed manager.

On the 29th of July, 1874, the Judge decided that *Shibpershad* did separate his property from that of *Joy Narain*.

On the 27th of July, 1874, the Judge ordered in the execution proceedings that the Respondent be allowed to proceed in execution of the decree made in *Shibpershad's* suit, holding that he fully represented the original decree holder.

Appeals were presented to the High Court against the decree of the 29th of July and the order of the 27th of July; and both were dismissed with costs.

Cowie, Q.C., and *Graham*, for the Appellant, contended that there was no intention on the part of *Shibpershad Giri* to effect a separation from the Appellant; and even if he had such intention, howsoever manifested, it did not under Mitakshara law

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constitute or effect legal separation in estate. The decree in *Shibpershad's* suit contained no direction for the partition of the estate, and would have been fully satisfied by the putting of *Shibpershad* into possession jointly with the Appellant, and the payment of the mesne profits awarded to him thereby. Reference was made to *Appovier* v. *Rama Subba Aiyan* (1), which overruled *Badamoo Koer* v. *Wazeer Singh* (2); *Sheo Dyal Tewaree* v. *Indoonath Tewaree* (3); *Mussumat Vato Koer* v. *Roushun Singh* (4); *Debee Pershad* v. *Phool Koeree* (5); *In re Mussumut Phuljhari Koer* (6).

The Respondent did not appear.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

The facts necessary to the understanding of this case are as follows:

Joy Narain Giri and *Shibpershad Giri* were grandsons of *Nund Kishore Giri;* they were joint in estate, and between them had the whole interest in the estate inherited from their grandfather. *Shibpershad Giri,* in consequence of his cousin *Joy Narain* refusing to allow him any participation in this joint estate, left the house in which they had jointly resided, went to reside with the husband of his sister, and had to maintain himself for some time by moneys which he borrowed. Under these circumstances he brought an action against *Joy Narain,* in which he alleged that *Joy Narain* had expelled him from the joint family, and that he sued to recover possession of his eight annas share of all the joint properties, both real and personal, with mesne profits and interest from the date of dispossession. In that suit he obtained a decree the material part of which is in these terms, "The Court orders that the half of the various properties which, as stated above, are in the possession of *Joy Narain* be decreed to the Plaintiff; that the date of separation from commensality is to be reckoned from the month of Bysack of the year 1272, and that from that date to

(1) 11 Moore's Ind. Ap. Ca. 75, 98.
(2) 5 Suth. W. R. 78.
(3) 9 Suth. W R. 61.
(4) 8 Suth. W. R. 82.
(5) 12 Suth. W. R. 510.
(6) 12 Beng. L. R. 385.

the date of obtaining possession he is to get the mesne profits of the immoveable properties according to what will be ascertained in execution of decree; that with regard to the household chattels, &c., the Plaintiff is to obtain half of what the Defendant has admitted; that the Plaintiff is to obtain half of the proceeds of the pledged properties which are sold for the realization of the government rent, as well as half of the amounts of the decrees realized from the month of Bysack, 1272; that the Plaintiff is to obtain half of the proceeds of 12 solees and 4 bissees of paddy at the rate of Rs.26 per bissee, and that he is to obtain half of all the properties mentioned in the said decree."

From that decree of the Subordinate Court there was an appeal to the High Court of *Calcutta*, which confirmed the decree. After the confirmation of that decree by the High Court, and pending an appeal by *Joy Narain* to Her Majesty in Council, *Shibpershad Giri* died; and thereupon *Joy Narain* applied for his widow to be substituted for him in the suit as Respondent in the appeal. The Courts in *India*, however, gave effect to a will—which had been made by *Shibpershad Giri* some short time probably before his death, in which he gave all his property to *Grish Chunder Myti*, the son of his sister—and made *Myti* the Respondent. The appeal came on in 1873 before Her Majesty in Council, whereupon Her Majesty, by the advice of this Board, affirmed the decree of the High Court of *Calcutta*. Upon this, *Joy Narain* commenced the present suit, in which in effect he alleges that he and *Shibpershad Giri* having been joint in estate, and there having been no separation between them, the decree enured for his benefit, and that he, as the heir of *Shibpershad Giri*, was entitled to the whole of the joint property; there was also an alternative prayer that if that were not so he might be appointed as manager; and he sought, among other things, to set aside the will of *Shibpershad Giri*. Pending this present suit, *Grish Chunder Myti*, who, as substituted Respondent, had obtained the judgment of this Board affirming the decree in the previous suit, applied for the execution of that decree in 1874; whereupon *Joy Narain* objected upon the ground which he raises in this suit, namely, that the former suit really enured for his benefit, and that *Grish Chunder Myti* took no right under it; he also alleged, among other objections, the pendency

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of the suit which he had already brought. The Courts in *India* allowed *Grish Chunder Myti* to execute the decree; and the second appeal, which we have now before us, is from the High Court allowing the execution of that decree.

It appears manifest from this statement of the case that the questions in both appeals are substantially the same. The real question in the cause is, whether there was a separation of estate between *Joy Narain* and *Shibpershad Giri*.

Their Lordships regard the conduct of *Shibpershad Giri*, when he left the house in which both he and *Joy Narain Giri* lived, and withdrew himself from commensality with his cousin, as indicating a fixed determination henceforward to live separately from his cousin, and they treat the fact of his borrowing money for his separate maintenance—as well as his making a will—as indicating, at all events, that he himself considered that a separation had taken place. His plaint indicates that he accepts what he terms the expulsion of his cousin from the joint family, and claims the share to which he would be entitled after that expulsion, and after a separation. But further, it appears to their Lordships that the decree which has been read is in effect to give to *Shibpershad Giri* a separate share of the property of the grandfather. It gives him in terms possession of the 8 annas which he claimed of the real estate; it gives him mesne profits from the day of the alleged separation,—that is, from the time when he left the house in which he had been living with his cousin,—and it gives him also a half of the personal property. That being so, their Lordships are of opinion that although the suit is not actually in terms for a partition, yet that the decree does effect a partition, at all events, of rights which is effectual to destroy the joint estate under the doctrine laid down in the case which has been quoted of *Appovier* v. *Rama Subba Aiyan* (1).

Their Lordships think it necessary to say that they do not regard their decision in this case as conflicting with a case which has been called to their attention of *Debee Pershad* v. *Phool Koeree* (2). The suit in that case is described by Mr. Justice *Kemp* as a suit by *Debee Pershad* for a declaration of his right to a share in the estate of his grandfather *Deen Dyal*. Such a suit would not be

(1) 11 Moore's Ind. Ap. Ca. 75. (2) 12 Suth. W. R. 510.

inconsistent with an intention on the part of *Debee Pershad* to obtain a declaration of his being entitled to a joint interest in a joint estate; but here, for reasons already given, their Lordships regard the plaint as of a totally different character, indicating a distinct intention, to which effect is given by the judgment, of obtaining a separation of estate, and as regards both the real and personal property.

For these reasons their Lordships are of opinion that the decree of the High Court is right, and they will humbly advise Her Majesty that that judgment be affirmed, and that both appeals be dismissed.

Solicitors for the Appellant: *Watkins & Lattey.*

SAHIBZADA ZEINULABDIN KHAN . . DEFENDANT;

AND

SAHIBZADA AHMED RAZA KHAN, AND OTHERS . . . . . } PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Act VIII. of 1859, *sect.* 119—*Right of Appeal from Decree obtained ex parte.*

In sect. 119 of Act VIII. of 1859, the words "no appeal shall lie from a judgment passed *ex parte* against a Defendant who has not appeared," relate to the case of a Defendant who has not appeared at all in the suit, and not to a Defendant who has once appeared, but who fails to appear on a day to which the cause has been adjourned.

APPEAL from a decree of the High Court (August 26, 1875) which dismissed an appeal from an order of the subordinate Judge of *Moradabad* (April 8, 1874).

The ground of such dismissal was that the last mentioned order having been obtained *ex parte*, no appeal lay to the High Court, and that the Appellant's remedy was to follow the procedure prescribed by sect. 119 of the Civil Procedure Code.

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

J. C.

1878

SAHIBZADA ZEINULABDIN KHAN v. SAHIBZADA AHMED RAZA KHAN.

The judgment of the High Court was as follows:—

"The suit was instituted on the 14th of September, 1872, and after much delay, owing to the residence of both parties in foreign territory, the hearing was, at the request of the pleaders of both parties, adjourned for the 5th of January, 1873, issues were framed, and October the 28th fixed for the hearing; the suit was not called on that date, but on the 7th of November, 1873. It was again adjourned at the like request to the 2nd of February, and subsequently to the 8th of April. On the 6th of April the Defendant Appellant submitted a petition praying for a further adjournment, on the plea that his pleader had gone to *Calcutta* to consult the Advocate-General, and could not return in time. This petition was not presented by a pleader nor by any duly authorized agent, and was rejected. On the 7th of April the Defendant's pleader telegraphed to the Subordinate Judge, requesting him to postpone the hearing. The Subordinate Judge refused to consider this irregular application, and on the 8th of April the case was called on in due course. Although the Defendant had an agent in *Moradabad*, no other pleader than *Ganesh Pershad*, who was absent in *Calcutta*, was appointed, and the Defendant appearing neither in person nor by pleader, on the 8th of April the case was heard and decided *ex parte* under the provisions of sects. 147 and 111. The Appellant subsequently took the proper step of applying to the Subordinate Judge, under sect. 119, for an order to set aside the judgment, but unfortunately he did not proceed with that application, and it was struck off for default, the Appellant being advised by his counsel to proceed by way of appeal. He is met by the objection that the appeal does not lie, as the judgment was passed *ex parte*. The Appellant's counsel urges that the case was not heard by the Subordinate Judge *ex parte* under sect. 111, that the default of the Appellant was such a default as is contemplated in sect. 145, and not such a default as is contemplated in sect. 147. It appears clear to us that the former section applies where the parties appear, but either of them fails to proceed with the case, while sect. 147 applies to cases like the present, in which at an adjourned hearing a party failed to appear. If the Judge heard the suit at all in the absence of the Appellant, he could only do so under the provisions of sect. 111. Having the option of

proceeding with the hearing, or again adjourning the case, he proceeded to hear and determine it.

"Then it is contended that the Appellant was entitled to proceed either by way of appeal or by an application under sect. 119, and *Kali Churn Dutt* v. *Modhoo Soodun Ghose* (1) is relied on, but that ruling has not apparently been followed in *Administrator General of Bengal* v. *Lala Dyaram Dass* (2), and in *Purus Ram* v *Jyuntee Pershad* (3) it has been held that no appeal lies.

"The omission to follow the procedure required by sect. 119 has deprived the Appellant of all remedy. The appeal must therefore be dismissed with costs."

Leith, Q.C., and *Arathoon*, for the Appellant, contended that sect. 119 of Act VIII. of 1859 only applied to cases where the Defendant had entered no appearance in the suit at all: see *Macpherson's* Civil Procedure, p. 126. [SIR JAMES W. COLVILE referred to sect. 147.] There is a sensible distinction between the case of a Defendant not appearing at all, and the case of his appearing, putting in his defence, but absenting himself from the final hearing. [SIR MONTAGUE E. SMITH:—In the one case the Judge may decide on default; in the other the case must be proved. SIR ROBERT P. COLLIER:—It is against policy to allow a Defendant to lie by in the first Court, and then dispute the case in the second Court.] Sect. 147 does not apply, for it relates to preliminary hearings and adjournments from first hearings. Reference was made to *Golluckbur* v. *Bishonath Gearee* (4); *Gorachand Goswami* v. *Raghu Mandal* (5); *Amritnath Jha* v. *Baboo Roy Dhunpat Sing Bahadoor* (6). [SIR JAMES W. COLVILE:—If he proceeded under sect. 148, there are two clear decisions of the *Madras* High Court that sect. 119 will not apply; see notes to *Broughton's* Civil Procedure Code, sects. 147 and 148.] By the general law the Appellant has a right of appeal, and it has not been taken away. See *Kali Churn Dutt* v. *Modhoo Soodun Ghose* (1). They distinguished the case of *Administrator General of Bengal* v. *Lala Dyaram Dass* (2), and admitted that *Purus Ram* v. *Jyuntee Pershad* (3) was against them.

(1) 6 Suth. W. R. 86.
(2) 6 Beng. L. R. 689.
(3) N. W. P. Rep. (1869), 59
(4) Marshall's Rep. 32.
(5) 3 Beng. Law Rep. App. 121.
(6) 8 Beng. Law Rep. 44.

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ACT I. OF 1869, sect. 22, cl. 11: *See* OUDH TALUKA.

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ACT VIII. OF 1859, sect. 119.] In sect. 119 of Act VIII. of 1859, the words "no appeal shall lie from a judgment passed *ex parte* against a Defendant who has not appeared," relate to the case of a Defendant who has not appeared at all in the suit, and not to a Defendant who has once appeared, but who fails to appear on a day to which the cause has been adjourned. SAHIBZADA ZEINULABDIN KHAN *v.* SAHIBZADA AHMED RAZA KHAN [233

ACT XX. OF 1869: *See* POWERS OF LEGISLATURE.

ACT XXVI. OF 1866.] Under-tenures held under contract, or under any arrangements from which a contract may be inferred, are within the definition of sub-proprietary rights given in the rules annexed to Act XXVI. of 1866, and their holders are entitled to a sub-settlement. MAHARAJAH OF BULRAMPUR *v.* UMAN PAL SINGH AND GANISH SINGH - - - - - - - 225

ACT XXXII. OF 1839, sect. 1: *See* INTEREST ON MESNE PROFITS.

ADOPTION: *See* JAIN LAW.

ADOPTION OF DISTANT KINSMEN: *See* HINDU LAW OF BENARES.

ADVERSE POSSESSION: *See* RES JUDICATA.

ALIENATION BY HEIR TO BONÂ FIDE PURCHASER: *See* MAHOMEDAN LAW.

AMOUNT OF MAINTENANCE: *See* HINDU WIDOW.

APPEAL ALLOWED THOUGH PRESENTED AFTER THE PRESCRIBED PERIOD: *See* OUDH TALOOKDARS RELIEF ACT.

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DECLARATORY DECREE: *See* RES JUDICATA.

DISCRETION OF THE COURT: *See* RES JUDICATA.

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DVÁMUSHYÁNA: *See* HINDU LAW OF BENARES.

EXECUTION: *See* INTEREST ON DECREE.

FORECLOSURE: *See* MORTGAGE.

GIFT TO A., HIS CHILDREN AND GRANDCHILDREN CONFER ABSOLUTE ESTATE: *See* HINDU GRANT.

HINDU GRANT.] A Hindu granted three villages as a talook at a certain rent to his sister by a sunnud which contained the following words: "You are my sister: I accordingly grant you a talook for your support . . . Being in possession of the lands and paying rent according to the tahut jumma, do you and the generations born of your womb successively (*santán sreni kramé*) enjoy the same. No other heir of yours shall have right or interest":—*Held*, that the donee took an absolute estate. The expression, "no other heir of yours shall have right or interest," makes the absolute estate before given defeasible in the event (which did not occur) of a failure of issue living at the time of her death, in which event the estate was to revert to the donor and his heirs.—In Hindu deeds words giving lands to a donee "his children and grandchildren," confer on him an absolute estate. BHOOBUN MOHINI DEBYA *v.* HURRISH CHUNDER CHOWDHRY - 138

HINDU LAW OF BENARES.] According to Hindu law as it obtains in *Benares*, failing a maiden daughter, the succession to a deceased father's estate devolves on an indigent married daughter, and her right of succession is not lost by reason of her becoming a childless widow.—The adoption of a very distant relation, not included within the sapindas of the adoptive father, made in violation of the preferential right of the son of a brother of the whole blood, was held to be valid. The texts which prescribe the preferential adoption of such son have not the force of laws. *Quære*, whether an only son of a brother can be adopted as dvyámushána. SRIMATI UMA DEYI *v.* GOKOOLANUND DAS MAHAPATRA - 40

HINDU WIDOW.] Case in which some of the elements in determining what is a suitable amount of maintenance for a Hindu widow out of her deceased husband's estate were considered.—A Court is not justified in reducing, as a kind of punishment for vexatious defence to a suit, the

HINDU WIDOW—*continued.*
amount of maintenance which it would otherwise have awarded. SREEMUTTY NITTOKISSOREE DOSSEE *v.* JOGENDRO NAUTH MULLICK - 55

HINDU WIDOW HOLDING UNDER CONTRACT: *See* ACT XXVI. of 1866.

IJARA: *See* RIGHT OF OCCUPANCY.

IMPARTIBLE ZEMINDARY.] An ancient and impartible zemindary, originally portion of the *Shivagunga* estate, having descended, under Mitakshara law, as joint ancestral estate to the eldest of three Hindu joint brothers, was in 1829 by a deed of family arrangement transferred by him to the two younger brothers (one of whom died subsequently without issue), to be held by them with all its incidents of impartibility and peculiar course of descent:—*Held*, that as between the descendants of the grantor and the son of the surviving grantee, the zemindary was the separate property of the latter; and that on his death his right passed to his widow, notwithstanding the undivided *status* of the family, according to the rule of succession affirmed in the *Shivagunga Case* (9 Moore's Ind. Ap. Ca. 539). PERIASAMI *v.* RAMASAMI CHETTI - - - - 61

INDIAN COUNCILS ACT, 1861, sect. 22: *See* POWERS OF LEGISLATURE.

INDIAN HIGH COURTS ACT, 1861: *See* POWER OF LEGISLATURE.

INTEREST ON DECREE.] Interest upon a decree cannot be levied in execution where the decree is silent as to subsequent interest on the amount decreed; but may be recovered by a fresh action instituted for that purpose.—*Pillai* v. *Pillai* (Law Rep. 2 Ind. Ap. 219) approved. SETH GOKULDAS GOPULDASS *v.* MURLI AND ZALIM - - 78

INTEREST ON MESNE PROFITS.] Interest on mesne profits may be awarded as of course from date of suit in a decree.—Although such interest may be given from a date prior to the suit, their Lordships, under the circumstances of this case, including an unexplained delay in prosecuting the appeal, directed that the interest should run only from date of suit. HURROPERSAUD ROY CHOWDHRY *v.* SHAMAPERSAUD ROY CHOWDHRY 31

JAIN LAW.] In a suit to establish a Jain widow's (under the usages and customs of the Saraogee religion) right of inheritance to her husband's estate, and to uphold her adoption of her daughter's son, as well as his right to succeed her after her death, by voiding the pretensions of the Defendant (brother of the deceased proprietor), who claimed as next of kin under Hindu law and under a nuncupative will alleged to have been made in his favour:—*Held*, that although ordinary Hindu law, in the absence of proof of special customs, has usually been applied to persons of the Jaina sect in *Bombay*, yet the Jains possess the privilege of being governed by their own peculiar laws and customs when the same are by sufficient evidence capable of being ascertained and defined and are not open to objection on grounds of public policy or otherwise;—*Held*, on the evidence, that—(*a.*) A sonless widow of a Saraogee-Agarwalas takes by the custom of the

JAIN LAW—*continued.*
sect a very much larger dominion over the estate of her husband than is conceded by Hindu law to the widows of orthodox Hindus, to the extent at least of an absolute interest in the self-acquired property of her husband.—(*b.*) A sonless widow also enjoys the right of adoption without the permission of her husband or the consent of his heirs.—(*c.*) A daughter's son may be adopted, and on adoption takes the place of a begotten son.—Although it is not an invariable rule that no questions can be raised at the hearing which are not indicated in the petition for special leave to appeal, yet where special leave had been obtained on the ground that important questions affecting a large community were involved in the decision sought to be appealed from, the Appellant was *held* to be precluded from objecting to the decree on the ground of its being declaratory only.—A right to come to the Court to have a document or act (*e.g.*, a claim under a nuncupative will) which obstructs the title or enjoyment of property cancelled or set aside, or for an injunction against such obstructions, would be sufficient to sustain a declaratory decree. SHEO SINGH RAI *v.* MUSSUMUT DAKHO - - 87

LANDS SEIZED AND SOLD OUT OF THE JURISDICTION: *See* SHERIFF'S SALE.

LIABILITY OF MASTER FOR THE WRONGFUL ACT OF HIS SERVANT: *See* MEASURE OF DAMAGE.

MAHOMEDAN LAW.] A creditor of a deceased Mahomedan whether in respect of dower or otherwise cannot follow his estate into the hands of a *bonâ fide* purchaser for value to whom it has been alienated by his heir-at-law, whether by sale or mortgage.—*Mussumut Wahidunnissa* v. *Mussumut Shabrattun* (6 B. L. R. 54) approved.—Such alienee is bound by any decree charging the estate passed in a suit against the heir, pending at the date of alienation. SYUD BAZAYET HOSSEIN *v.* DOOLI CHUND - - - - - - 211

MEASURE OF DAMAGE.] In estimating the damages for the conversion of Plaintiff's goods, the value of the goods at the place where the principal market for them exists, is the right basis of calculation; but there must be deducted from the price at which they could there have been sold, the cost of conveying them thereto.—*Morgan* v. *Powell* (3 Q. B. 278) approved.—In an action to recover damages from the Defendants for obstructing the Plaintiff's right of ingress and egress to a forest, and his right of obtaining and removing timber therefrom, *held*, on the evidence, that the obstruction was not caused by the persons who were agents of the Defendants for the purpose of working in the forest, or of doing any class of acts analogous to those complained of, and that the Defendants were not shewn to have knowingly adopted or ratified those acts, and that the acts were not shewn to have been committed for their benefit.—A principal is answerable for the act of his agent in the course of his master's business and for his master's benefit, and for every such wrong of the servant or agent as is committed in the course of the service, and for the master's

MEASURE OF DAMAGE—*continued.*

benefit. Though the master may not have authorized the act, if he has put the agent in his place to do a particular class of acts, he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in. BURMAH TRADING CORPORATION *v.* MIRZA MAHOMED ALLY SHERAZEE - - - - 130

MITAKSHARA LAW.] Although a suit does not actually in terms seek a partition, yet if it indicates a distinct intention, and the decree gives effect thereto, of obtaining a separation in estate, such decree effects a partition, at least as regards the joint title.—*Appovier* v. *Rama Subba Aiyan* (11 Moore, I. A. 75) approved. JOY NARAIN GIRI *v.* GRISH CHUNDER MYTI - -

2. —— In a suit by the heirs of the mortgagees of certain property, for possession and for registration of names, against the mortgagors thereof and certain purchasers of the equity of redemption in part thereof, it appeared that proceedings had been taken to obtain foreclosure under Reg. XVII. of 1806; that no sufficient proof of notification, under sect. 8 of the Reg., to the mortgagors of the Plaintiff's petition of foreclosure had been given in the suit; that the zillah Judge in the foreclosure proceedings had found due service of the foreclosure petition on a mere statement to that effect by the nazir; that six out of nineteen mortgagors had admitted due service of the petition: *Held* (1), that the finding of the zillah Judge in the foreclosure proceedings, so far from being conclusive, was not even *primâ facie* evidence in the suit of service, sufficient to shift the *onus* of proof in regard thereto.—(2.) The duties of the zillah Judge in foreclosure proceedings are of a ministerial nature, and service of the petition therein must be strictly proved in a suit to enforce them.—(3.) The year allowed for redemption runs from the date of notification, and not from the date of the Judge's order on the petition.—*Mohesh Chunder Sein* v. *Mussamut Tarinee* (10 Suth. W. R. F. B. 27) approved.—(4.) The mortgage being for one entire sum, of one entire share of property, giving one entire right against all the mortgagors, notification to the above-mentioned six mortgagors would be insufficient to warrant the foreclosure of the whole property or any of it.—(5.) The purchasers of the equity of redemption, whether they have taken possession or not, having purchased prior to the foreclosure proceedings, must be duly served. NOBENDER NARAIN SING *v.* DWARKA LAL MUNDUR - - - - - 18

NOTIFICATION: *See* MORTGAGE.

OBJECTION TO DECREE AS DECLARATORY PRECLUDED, SPECIAL LEAVE HAVING BEEN GRANTED ON OTHER GROUNDS: *See* JAIN LAW.

OUDH TALUKA.] A sunnud of a taluka in *Oudh*, which had been previously confiscated by Government, was granted, with full power of alienation, to the widow of the last owner, a Hindu, and to her heirs for ever, her name being entered in the first and second lists under Act I. of 1869, s. 8, one condition of the grant being expressed to be that

OUDH TALUKA—*continued.*

in the event of her dying intestate, or of any of her successors dying intestate, the estate should descend to the nearest male heir, according to the rule of primogeniture:—*Held*, in suits against the widow's daughter, that the sunnud conferred upon the widow and her heirs male the full proprietary right and title to the estate, and not merely an estate for life with remainder to the male heirs of her husband in the event of her dying intestate without having alienated it in her lifetime:—*Held*, also, as regards succession, that the limitation in the sunnud was wholly superseded by Act I. of 1869, and that the rights of the parties claiming by descent must be governed by sect. 22 of that Act, the provisions of which are not controlled in any way by sect. 3 and sect. 4 thereof:—*Held*, that, under clause 11 of sect. 22, the above taluka, which was the separate property of the widow, descended, in the absence of a proved custom of her tribe to the contrary, to her daughter in preference to the son of the daughter of a rival widow, and the remote male heirs of her husband. BRIJ INDAR BAHADUR SINGH *v.* RANEE JANKI KOER. LAL SHUNKUR BUX *v.* RANEE JANKI KOER. LAL SEETLA BUX *v.* RANEE JANKI KOER 1

OUDH TALOOKDARS RELIEF ACT (XXIV. OF 1870 sect. 10.] Case in which, having regard to exceptional circumstances and exceptional legislation, an appeal to the Commissioner of Division against a decision of a manager appointed under the *Oudh Talookdars Relief Act*, was *held* to have been rightly allowed, although preferred long after the period of six weeks prescribed by sect. 10. It appeared that the Appellant in the Court below was a minor, and incapable of exercising his right to appeal except through the manager, who himself made the order appealed from, and that the Respondents (present Appellants) had after the expiration of the said six weeks themselves prayed for a judicial determination of substantially the same questions as were raised by the present appeal. RAMJIDAS AND IMTIAZ ALI *v.* RAJAH BHAGWAN BAX - - - 197

PARTITION: *See* IMPARTIBLE ZEMINDARY; MITAKSHARA LAW.

PETITION: *See* PRACTICE.

POWERS OF LEGISLATURE.] Act No. XXII. of 1869 of the Indian Legislature, which excludes the jurisdiction of the High Court within certain specified districts, is not inconsistent with the *Indian High Courts Act* 24 & 25 Vict. c. 104), or with the charter of the High Court, and is in its general scope within the legislative power of the Governor-General in Council.—The 9th section of that Act, which confers upon the Lieutenant-Governor of *Bengal* the power to determine whether the Act or any part of it, shall be applied in a certain district, is conditional legislation, and not a delegation of legislative power.—Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a provincial legislature, they may be well exercised either absolutely or conditionally; in the latter case leaving to the discretion of some external authority the time and manner of carrying its legislation into effect, as also the area over which it is to extend. QUEEN *v.* BURAH - - 178

PRACTICE.] A Respondent, who has been properly made a party to a suit in the Courts below and bound by the proceedings therein, but who has not entered an appearance as Respondent to the appeal, or ordered any person to do so for him (the Appellant having failed to take the usual steps either to compel his appearance or to have the appeal regularly heard *ex parte* against him) is not entitled to have a re-hearing of the appeal, unless by some accident, without any default on his part, the appeal has been inadvertently disposed of, as if he had been heard.—*Rajunderanarain Rae* v. *Bijai Govind Singh* (1 Moore's P. C. Cases, 117; S. C. 2 Moore's Ind. App. Cas. 214). and *Ex parte Kistonauth Roy* (Law Rep. 2 P. C, 274), approved.—Where it appeared that a Respondent had full knowledge of the pendency of the appeal, and had furnished the funds for defending it in the name of another Respondent thereto, a re-hearing was refused. — An issue whether or not such Respondent had been properly made a party to the suit in the Courts below, and whether or not the proceedings in *India*, so far as he was concerned, were *coram non judice*, can only be tried in a new suit in the Courts below; and *quære* whether in such suit he would be barred by an Order in Council, if made on appeal from a decree by which he was not bound. MAHARAJAH PERTAB NARAIN SINGH *v.* MAHARANEE SUBHAO KOER - - - - - - - 171

PROOF OF CUSTOM: *See* JÁIN LAW.

PROOF OF NOTIFICATION: *See* MORTGAGE.

REDEMPTION: *See* MORTGAGE.

REG. XVII. OF 1806, s. 8: *See* MORTGAGE.

REHEARING: *See* PRACTICE.

RES JUDICATA.] In a suit to recover possession of certain houses and grounds appertaining thereto, it appeared that the property had formed the subject of another suit brought by the Plaintiff against his grandfather's widow and the Defendant's father and aunt in which the Plaintiff's claim to restrain the widow from acts of waste had been dismissed, no claim, however, to the property having then been made by the Plaintiff, nor any allegation made or evidence offered to connect the Defendant's father therewith:—*Held*, that the decision in the former suit was not a decision in a suit between the same parties, or parties under whom they claim, establishing the right of the Defendants in the former suit to the property in question in the present suit, and that the cause of action in the present suit was not determined in the former suit.—A plea of limitation in the present suit cannot be sustained without evidence as to the title under which Defendants, or those under whom they claim, held the property in question; whether in their own right or as trespassers, or under an arrangement with the Plaintiff. ZEMINDAR OF PITTAPURAM *v.* PROPRIETOR OF THE MUTTA OF KOLANKA - - - - - - 206

2. —— The Appellant having been a party to former suit in which the Respondent obtained a decree for possession of the estate in question as mother and heiress of the last proprietor, is barred by such decree from afterwards

RES JUDICATA—*continued.*

recovering possession on the ground that the Respondent is not such heiress.—Although such decree barred the Appellant from setting up in this suit a family custom for the purpose of shewing that he was entitled to possession during the life of the Respondent, he is not thereby barred from shewing that upon her death, if he survives, he will be entitled, under such custom, to succeed her, and therefore to have a certain deed executed by her declared illegal and inoperative after her death.—Their Lordships, however, declined to remand the case for adjudication thereupon. A declaratory decree was matter of discretion, and, while the necessary investigation would cause great delay and expense, the claim of the Appellant was contingent on his surviving the Respondent, and the decree would not bind other members of the family not parties to the suit, with possibly preferable titles. TEKAIT DOORGA PERSAD SINGH *v.* TAKAITNI DOORGA KONWARI - - 149

RIGHT OF APPEAL FROM DECREE OBTAINED EX PARTE: *See* ACT VIII. OF 1859, SECT. 119.

RIGHT OF OCCUPANCY.] By the terms of an ijara (1865) the Defendants were entitled at the end of a term of five years to a renewal of their lease of the chur land in dispute at a rent to be fixed according to the measurement of the land to be made at that time, and to the productive powers of the land. Three years after the expiration of the said term a notice was served on the Defendants to come to a new settlement with the Plaintiff, and in 1874 the Plaintiff sued to recover possession. The Defendants claimed a right of occupancy acquired under Act VIII. of 1869 (*Bengal*), or under Act X. of 1859:—*Held*, that the Defendants holding as ijaradars prior to and during the lease of 1865 did not create in them a right of occupancy, and that the Plaintiff had a right to turn the Defendants out of possession at the expiration of the term of five years, except so far as that right was qualified by the stipulations for a renewal; that the Defendants at the expiration of that lease had an equitable right to renewal not exceeding five years, according to the stipulations in the agreement; but that it was too late to rely upon their title to a renewal, which if it had been granted would now have expired. JARDINE, SKINNER, & Co. *v.* RANI SURUT SOONDARI DEBI [164

RIGHTS OF PURCHASE: *See* SHERIFFS' SALE.

RIGHT TO RENEWAL: *See* RIGHT OF OCCUPANCY.

SANTÁN SRENI: *See* HINDU GRANT.

SEPARATE PROPERTY OF WIDOW: *See* OUDH TALUKA.

SHERIFF'S SALE.] *Quære*, can a purchaser at a sheriff's sale under a writ of *fi. fa.*, upon being evicted by the execution debtor, recover the purchase-money from the execution creditor, when the sheriff was without authority to execute the writ at the place where the property was situate, but did so under the authority and by the express direction of the judgment creditor: *Held*, that such a case was distinguishable from a sale by

SHERIFF'S SALE—*continued*
private contract, and being that of a sale *in invitum*, must be governed by rules peculiar to sheriff's sales:—*Held*, further, that in such case the sheriff undertakes by his conduct that he has seized and put up for sale the property sold in the exercise of his jurisdiction, and the execution creditor must be treated as a principal in the transaction.—Case remanded to be tried whether, on the facts to be proved, a cause of action having been shewn by the plaint, the evicted purchaser was entitled to recover back the purchase-money as money had and received to his use as upon a total failure of consideration, or to any other and what relief. DORAB ALLY KHAN *v.* ABDOOL AZEEZ - - - - - - - 116

SUB-SETTLEMENT: *See* ACT XXVI. OF 1866

SUCCESSION OF INDIGENT DAUGHTER THOUGH A CHILDLESS WIDOW: *See* HINDU LAW OF BENARES.

SUCCESSION OF WIDOW TO ZEMINDARY AS TO SEPARATE ESTATE: *See* IMPARTIBLE ZEMINDARY.

SUNNUD TO WIDOW AND HER HEIRS: *See* OUDH TALUKA.

TRANSFER: *See* IMPARTIBLE ZEMINDARY.

WIDOW'S ESTATE *See* JAIN LAW.

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